92-2060

No. _____

Supreme Court, U.S.
FILED
JUN 21 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMIE MARIE (BUNGER) PRAYSON,
and JASON DEAN (BUNGER) PRAYSON,

Petitioners,

vs.

KANSAS CITY POWER & LIGHT COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1.

Does the decision of the Western District of the Missouri Court of Appeals in this case conflict with *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed.2d 296 (1971), where: (a) since 1928, the survivors of an employee of an independent contractor killed on the job could recover from a landowner under a theory of vicarious liability if the employee was engaged in inherently dangerous activity at the time of his death, and (b) on February 13, 1991, the two minor plaintiffs obtained a judgment of $1,300,000 for the death of their father under this doctrine, and (c) on May 3, 1991, the Supreme Court of Missouri abolished the doctrine, and (d) the Missouri Court of Appeals retroactively applied the Missouri Supreme Court's decision and held that the reliance factor did not include decisions about whether to litigate, and held that the decision was "clearly foreshadowed" by the decisions of non-Missouri jurisdictions abolishing the doctrine and the enactment of Missouri's worker's compensation law in 1928?

2.

Does a jury verdict in favor of two minor plaintiffs become a vested or property right at the time of the verdict, so that there is a denial of the plaintiffs' Fifth and Fourteenth Amendment due process rights when a Missouri Supreme Court decision

nearly three months after the verdict abolishes the theory of recovery under which the verdict was obtained and is retroactively applied to deprive the plaintiffs of the jury's award of $1,300,000 for the wrongful death of their father?

3.

Is there a denial of the minor plaintiffs' Fourteenth Amendment equal protection rights where, under Missouri law, a change in the judicial interpretation of a statute cannot be applied retroactively to deprive persons of vested rights based on the prior construction of the statute, but a judicial abolition of a tort theory of recovery can be applied retroactively to take away a jury verdict awarded under the prior doctrine?

4.

Has there been a denial of the minor plaintiffs' Fifth and Fourteenth Amendment equal protection and/or due process rights where they are denied leave to plead a theory of direct liability against the defendant landowner; they obtain a jury verdict based on a theory of vicarious liability; a Missouri Supreme Court decision abolishing the theory of recovery is applied retroactively to take away the verdict and the plaintiffs are denied the opportunity to proceed on their theory of direct liability, when Missouri law in fact permits direct liability claims against landowners?

LIST OF PARTIES

Plaintiffs-Petitioners:

Jamie Marie (Bunger) Prayson and Jason Dean (Bunger) Prayson, by and through their mother and next friend, Mary Jane Prayson

Defendant-Respondent:

Kansas City Power & Light Company

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JURISDICTIONAL STATEMENT

On December 22, 1992, the Western District of the Missouri Court of Appeals handed down its decision in the case of *Prayson v. Kansas City Power & Light Company*, 847 S.W.2d 852 (W.D. Mo. App. 1992). On February 2, 1993, the Western District of the Missouri Court of Appeals denied Plaintiffs' Motion for Rehearing, or in the Alternative, for Transfer to the Supreme Court of Missouri. On March 23, 1993, the Supreme Court of Missouri denied Plaintiffs' Motion to Transfer.

This Court has jurisdiction to review the judgment of the Western District of the Missouri Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1257.

Constitutional Provisions

Amendment V, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 18, 1985, Larry Dean Bunger (the father of Plaintiffs Jamie Marie (Bunger) Prayson and Jason Dean (Bunger) Prayson, was an employee of B & L Electric. Prior to that date Kansas City Power & Light Company had entered into a contract with B & L to perform work on KCP&L lines, including the installation of lightning arrestors and squirrel proofing of the transformers on utility power lines. On January 18, 1985, Mr. Bunger was installing lightning arrestors and squirrel proofing the transformer on a KCP&L utility power line. In the process, he de-energized the transformer by opening the fuse on the fuse mounting, and while using a non-insulated wrench with his right hand to loosen a bolt on the bottom of the fuse mounting, his hand slipped and he brought the non-insulated tool into contact with the top of the fuse mounting, which was still energized. He died as a result.

In 1928, the Missouri Supreme Court decided that a landowner could be held vicariously liable for the injury or death of an employee of an independent contractor if the employee was engaged in an inherently dangerous activity at the time of the injury or death. The case overruled a 1912 decision holding that the landowner could not be held liable,

and it arose out of a fact situation that occurred prior to the enactment of Missouri's workers' compensation law in 1928.

In 1988, Mr. Bunger's children, through their mother, filed a wrongful death action against KCP&L in the Circuit Court of Jackson County, Missouri. In 1990, the Missouri Supreme Court reaffirmed the validity of the inherently dangerous activity doctrine, but also stated that it was possible to state a claim of direct liability against the landowner. The Praysons asked leave to set out a direct liability claim in Count I of a Second Amended Petition, and a vicarious liability claim under the 1990 decision in Count II. The trial court denied leave to file the Second Amended Petition on the basis that Count I failed to state a cause of action. Plaintiffs filed a Third Amended Petition, limited to a vicarious liability claim under the inherently dangerous activity doctrine.

Plaintiffs proceeded to trial against KCP&L and on February 13, 1991, a jury awarded them $2,000,000 in damages, but found Mr. Bunger 35% at fault, which reduced the award to $1,300,000. While KCP&L's motion for new trial or in the alternative, for judgment n.o.v., was pending, the Missouri Supreme Court, on May 3, 1991, handed down a decision which abolished the inherently dangerous activity

doctrine where the employee of the independent contractor was covered by workers' compensation.

The trial court applied the May 3, 1991, decision retroactively and granted KCP&L's motion for judgment n.o.v., but stated that if it were not for the Missouri Supreme Court's decision the verdict would have remained in effect. On December 22, 1992, the Missouri Court of Appeals, Western District, affirmed the trial court, and refused to permit Plaintiffs to pursue their direct liability claim against KCP&L. Following a denial by the Missouri Court of Appeals of Plaintiffs' Motions for Rehearing or Transfer to the Supreme Court, the Missouri Supreme Court denied Plaintiffs' Motion to Transfer on March 23, 1993.

Following the decision of the Missouri Supreme Court on May 3, 1991, which abolished the theory of recovery under which Plaintiffs had obtained a verdict on February 13, 1991, Plaintiffs raised their constitutional arguments in their Suggestions in Opposition to the retroactive application of that decision. [Appendix Vol. 2 at 64.] In the Missouri Court of Appeals, Plaintiffs argued their equal protection and due process claims. Point I of the Praysons' argument in that Court (as found in the Table of Contents of their brief), reads:

I. The trial court erred in holding that *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384 (Mo. 1991) (en banc) was retroactive, and therefore required the granting of Defendant Kansas City Power & Light Company's Motion for Judgment Notwithstanding the Verdict. The *Zueck* decision is a prospective decision because it is procedural, rather than substantive, or alternatively, if it is a substantive decision, it meets the three-prong test of *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. 1985) (en banc) for prospective application since it overrules clear past precedent; the purpose of the *Zueck* decision would be retarded by retroactive application and because appellants relied on the pre-*Zueck* case law in making their determination to proceed with this litigation.

Section 1. Procedural or Substantive

Section 2. The Fundamental Fairness Tests

Section 3. Equal Protection

Section 4. Due Process

Section 5. Conclusion

In its decision, the Missouri Court of Appeals addressed the Praysons' constitutional arguments:

> As their final arguments under Point I, the Praysons argue that (1) retroactive application of a change in tort law effected by a judicial decision constitutes a denial of equal protection, and (2) the trial court's granting of the j.n.o.v. constituted an unjust taking because the jury verdict in favor of the Praysons became a vested property right under the due process clauses. The Prays fail to cite Missouri authority for either of these arguments. Point I is denied.

[Appendix Vol. 1 at 19.]

Argument

Section 1. Introduction

The issues in this Petition fall into two areas: (1) the constitutional validity of retroactive application of a 1991 decision of the Supreme Court of Missouri which abolished a vicarious liability theory of recovery under which the minor plaintiffs had obtained a $1,300,000 judgment against Kansas City Power & Light Company (KCP&L) three months prior to the overruling decision, and (2) the constitutionality of denying the plaintiffs, who had attempted to plead a direct liability theory of recovery but were denied leave to do so, the opportunity to plead and prove their claim of direct liability on the part of KCP&L for the death of their father.

Section 2. Conflict with *Chevron Oil Company v. Huson*, Equal Protection and Due Process

In 1985, the Supreme Court of Missouri adopted a three-factor test to determine whether an overruling decision would be applied prospectively or retroactively:

> In order to clarify the issues regarding the operation of judicial decisions, we adopt a three-factor test to determine whether an overruling decision of this Court should be given prospective-only effect. First, the decision in question "must establish a new principle of law...by overruling clear past precedent...." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106, 92 S. Ct. 349, 355, 30 L. Ed.2d 296 (1971). Second, the Court must

> determine whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective operation. *See* [*Linkletter v. Walker*, 381 U.S. 618, 629, 85 S. Ct. 1731, 1737, 14 L. Ed.2d 601 (1965)]. Third, the Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule. [Citation omitted.]

Sumners v. Sumners, 701 S.W.2d 720, 724 (Mo. 1985) (en banc). The Missouri Supreme Court was relying on the decisions of this Court in deciding how to deal with the question of retrospective *vs.* prospective application of an overruling decision.

> If the parties have relied on the state of the decisional law as it existed prior to the change, courts may apply the law prospectively in order to avoid injustice and unfairness.
>
> > One of the most important factors considered by the courts "in deciding whether and to what extent a judicially changed rule of law should be give retroactive effect" is "the degree to which the prior rule may have been justifiably relied on". Annot. 10 A.L.R.3d 1371, 1378 (1966).

Id. at 723. And later:

> By applying a decision prospectively-only when reliance by a party is found, courts seek to avoid

> injustice, hardship and unfairness. [Citations omitted.] A standard which seeks to avoid injustice, hardship and unfairness requires that the interests of parties on both sides of the prospective-retrospective issue be weighed. A court must balance the hardship imposed on those who may have relied on a precedent against the hardship which may result for those who do not benefit from the application of a change in precedent.

Id.

This Court's standards on the nonretroactivity issue were set out in *Chevron Oil Company v. Huson*, 404 U.S. 97, 106-107, 92 S. Ct. 349, 355, 30 L. Ed.2d 296 (1971):

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [citation omitted], or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citation omitted.] Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." [Citation omitted.] Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [Citation omitted.]

In *Chevron*, the plaintiff's injuries occurred in 1965; he filed suit in federal court in 1968, and in 1969 this Court decided *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed.2d 360 (1969), which in theory would have made his suit untimely, since *Rodrigue* mandated the application of the relevant state statute of limitations (in *Chevron*, the Louisiana one-year statute).

> When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings, these [prior] Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was. "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights." [Citation omitted.]
>
> ...retroactive application of the Louisiana statute of limitations would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress.
>
> It would also produce the most "substantial inequitable results," [citation omitted], to hold that the [plaintiff] "slept on his rights" at a time when he could not have known the time limitation that the law imposed upon him. ...Certainly, the [plaintiff's] potential redress

> for his allegedly serious injury—an injury that may significantly undercut his future earning power—is entitled to similar protection. ...nonretroactive application here simply preserves his right to a day in court.

Chevron, 404 U.S. at 107, 92 S. Ct. at 356.

In applying *Chevron*, the Missouri Court of Appeals held that the reliance factor was applicable only to decisions made by the plaintiff(s) *prior* to the event which gave rise to the litigation. For example, *Trans UCU, Inc. v. Director of Revenue*, 808 S.W.2d 374 (Mo. 1991) (en banc), involved a situation where an earlier decision of the Missouri Supreme Court adopted a certain policy relating to state use taxes. Trans UCU relied on that decision and the advice of its attorneys when purchasing an airplane out-of-state and placing it into service, and in not paying Missouri use taxes on the acquisition. Four years after the first decision, the Missouri Supreme Court reversed itself, making a transaction of the type Trans UCU engaged in a taxable transaction and the Missouri Director of Revenue sought back taxes, interest and penalties from Trans UCU. The Missouri Supreme Court applied its overruling decision prospectively, because of the court's sudden and unexpected change of direction, and Trans UCU was not liable for the taxes.

The Missouri Court of Appeals held [Appendix Vol. 1 at 17] that application of the reliance factor did not apply to decisions about whether or not to litigate, but only to decisions made prior to the event which gave rise to the litigation. It pointed out that UCU relied on existing law in making a business decision, and therefore that was why the Missouri Supreme Court's change of heart about the tax consequences of that decision, *after* the purchase was made, had to be applied prospectively.

This is clearly in conflict with *Chevron*. There, the plaintiff relied on existing law (and inferentially on the advice of his counsel) in determining when to sue, and in determining whether his suit was time-barred. The case had only proceeded through a year of discovery, yet this Court held that it would be inequitable to deny Mr. Huson his day in court, particularly when his injuries were allegedly sufficiently serious to have a significant detrimental effect on his future earnings. In this case, the minor plaintiffs relied on Missouri law that had been in effect for more than six decades, and on the advice of their counsel, when deciding whether it was possible to sue the landowner (KCP&L) for the death of their father, and thereafter initiating the litigation and carrying it through to a trial and a verdict in their favor.

In *Salmon v. Kansas City*, 241 Mo. 14, 145 S.W. 16, 24 (1912), the Missouri Supreme Court held that the inherently dangerous activity exception was not applicable to employees of an independent contractor. Sixteen years later, in *Mallory v. Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W.2d 617, 624-627 (Mo. banc 1928), *Salmon* was overruled and the inherently dangerous activity exception was extended to employees of independent contractors, making the landowner vicariously liable for the employee's injuries. As late as 1990, shortly before the trial in this case, the Missouri Supreme Court reaffirmed the doctrine of vicarious liability for landowners for the death or injury of an employee of an independent contractor engaged in an inherently dangerous activity at the time of the death or injury. *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. 1990) (en banc).

Plaintiffs attempted to file a Second Amended Petition to include a direct liability claim against KCP&L, and a vicarious liability claim. [Appendix Vol. 1 at 31.] The trial court, believing that *Ballinger* eliminated the possibility of a direct liability claim, denied plaintiffs leave to file the Second Amended (two-Count) Petition. The trial court did, however, permit the filing of the Third Amended Petition [Appendix Vol. 2 at 49], which contained only the vicarious liability claim, and

it was the trial of this claim which resulted in the $1,300,000 verdict in favor of the plaintiff children. After the verdict in this case, but prior to the trial court's ruling on KCP&L's motion for new trial, the Missouri Supreme Court overruled *Mallory*, in *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384 (Mo. 1991) (en banc). Plaintiffs argued that they were denied their Fifth and Fourteenth Amendment due process and equal protection rights by the retroactive application of *Zueck*.

In purporting to apply *Chevron*, the Missouri Court of Appeals held:

> Although *Zueck* overrules *Mallory* and all cases following *Mallory*, neither *Mallory* nor *Ballinger*, which followed *Mallory*, can be considered clear past precedent on the issue of whether the inherently dangerous activity exception should be applied to employees of independent contractors covered by workers' compensation, the issue considered in *Zueck*. *Mallory* involved an accident suffered by an employee prior to the effective date of Missouri's first workers' law, and did not consider the impact of the new law. *Zueck*, 809 S.W.2d at 387. *Mallory* could not establish clear precedent on the issue presented in *Zueck*. While *Ballinger* was decided after the effective date of workers' compensation laws, "the dispositive issue [in *Zueck*]...was not before the court in *Ballinger*." *Zueck*, 809 S.W.2d at 387.

While *Zueck* may establish a new principle of law by deciding an issue of first impression, the resolution of this issue was clearly foreshadowed. As the *Zueck* court notes,

> With the advent of Workers' Compensation laws, most states have restricted the application of the inherently dangerous doctrine to its original concept—protection of innocent third parties not involved in the activity. Thus, under the law of those jurisdictions, employees of independent contractors may not recover from the landowner by invoking the inherently dangerous exception.

Id. The first part of the *Sumners* fundamental fairness test does not call for prospective-only application of *Zueck*.

[Appendix Vol. 1 at 11-12.]

This holding represents a conflict with *Chevron* that is equal to or greater than the holding of the Missouri Court of Appeals that decisions to litigate based on existing law may not be considered as "reliance" on existing law for purposes of determining nonretroactivity. *Chevron* looked at two possibilities: the overruling of clear past precedent *or* the deciding of a question of first impression where the result was not "clearly foreshadowed."

The error in the Missouri Court of Appeals' application of *Chevron* in this instance lies first in its "clear past precedent" analysis. The court found there was no clear past

precedent because: (a) *Zueck* amounted to a return to the 1912 doctrine of non-liability, rather than the announcement of an entirely new doctrine, and (b) *Mallory* and *Ballinger* were not clear past precedent because the issue of the effect of workers' compensation laws on the inherently dangerous activity doctrine of vicarious liability for landowners had never been expressly addressed.

While it is true that *Chevron* dealt with prior decisions of the federal Courts of Appeals which had directly addressed the principle relied upon by Mr. Huson in the filing of his suit, *Mallory* is nevertheless a clear and unequivocal decision of Missouri's highest court that a landowner may be held vicariously liable for the injury or death of the employee of an independent contractor if the employee is engaged in an inherently dangerous activity at the time of his injury of death. *Ballinger* reaffirmed the viability of the doctrine. The fact that no one challenged *Mallory* on any basis for more than sixty years is irrelevant to the nonretroactivity analysis and to the *Chevron* standards.

Precedent, in its simplest sense, is simply a statement that: "You *can* do A," or "You can *not* do B." The *reason* why "A" is permissible and "B" is not permissible, is not relevant to the question of whether "A" or "B" can be done. If

that were so, then anyone could escape liability for doing "B" instead of "A" by arguing that his reason for doing "B" was different from the reason the court gave for determining "B" was not permissible. Courts would become bogged down in a quagmire of litigation if precedent could be set aside or ignored merely because of one's reason for doing something other than what case precedent required.

The *reason* behind a precedent becomes relevant when, and only when, the precedent is challenged and someone seeks a change in that precedent. But merely because someone came up with a new theory or a new rationale for changing the precedent, as happened in *Zueck*, does not diminish the vitality of the earlier decision. After *Mallory*, and for more than sixty years, a landowner could be held vicariously liable under the inherently dangerous activity doctrine. The trial court in this case recognized that regardless of whether the Supreme Court of Missouri had ever considered the particular arguments raised by KCP&L in its motion for summary judgment, the inherently dangerous activity doctrine was still valid in Missouri—at least at that moment in time. [Appendix Vol. 1 at 29.] It is the result of the case which is the precedent, not the rationale for reaching the result.

The second conflict is the Missouri Court of Appeals' quantum leap from a comment in *Zueck* (quoted above) about what other jurisdictions have been doing in the past sixty years about this issue, to the conclusion that the decisions of other jurisdictions "clearly foreshadowed" what the Missouri Supreme Court would do in *Zueck*, and therefore the plaintiffs here cannot be said to have relied on existing law to their detriment. The Missouri Court of Appeals attempted to bolster this theory with the argument that the mere existence of Missouri's workers' compensation laws since 1928 "foreshadowed" the outcome of *Zueck*. If this Court permits that interpretation of *Chevron* to stand, then every attorney in Missouri would have to become an expert in the laws of every other state in this nation in order to give a client proper legal advice.

Neither the trial court nor the Missouri Court of Appeals cited a single *Missouri* appellate decision which suggested that if and when the Missouri Supreme Court was confronted with the argument that workers' compensation should be the exclusive remedy for an injured employee of an independent contractor even if he was engaged in inherently dangerous activity at the time of the injury, the Missouri Supreme Court would agree and would abolish the *Mallory* doctrine of

vicarious liability for landowners. The *Zueck* language can hardly be said to indicate that plaintiffs in this case should have known, *before filing suit*, that if someone raised the issue in the Missouri Supreme Court while this case was pending, *Mallory* would be overruled. Neither these plaintiffs nor their counsel, *nor any other plaintiffs or their counsel, in or out of Missouri*, should be held to a standard that requires the ability to foretell the future, with or without benefit of a crystal ball.

That is precisely what the Missouri Court of Appeals' application of *Chevron* would entail, however. And there is nothing in *Chevron* or its progeny which suggests that this Court intended the "clearly foreshadowed" language to impose a requirement on plaintiffs and their counsel that they be so familiar with regional or national trends in tort litigation that they can be held accountable for predicting what *their* state supreme court will do, based on events occurring elsewhere in the country.

In determining whether there has been a violation of the Equal Protection Clause, three things are examined: the character of the classification; the individual interests affected by the classification, and the governmental interests asserted in support of the classification. *Dunn v. Blumstein*, 405 U.S. 343, 92 S. Ct. 995, 999, 31 L. Ed.2d 274 (1972). But before that

analysis can take place, the standard of review must be determined: strict scrutiny, when the classification involves a suspect classification such as race, ancestry or alienage, *Hoffman v. United States*, 767 F.2d 1431, 1434 (9th Cir. 1985), or the rational basis standard, *i.e.*, whether "the classification rests on grounds wholly irrelevant to the achievement of the State's objective," *id.* at 1435, citing *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 1104-1105, 6 L. Ed.2d 393 (1961).

The classifications at issue here are two groups: those who are affected by an overruling judicial decision which changes the construction of a statute (prospective application) and those persons affected by an overruling judicial decision in tort law (prospective application if the decision deals with procedural law, retrospective application if the decision deals with substantive law, *Bethell v. Porter*, 595 S.W.2d 369, 375 (W.D. Mo. App. 1980). Actions of state courts are action of the particular state within the meaning of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 842 (1948).

In *Eberle v. Koplar*, 85 S.W.2d 919, 923 (Mo. App. 1935), the court said:

> [W]here a statute or law has received a given construction by a court of last resort, the...parties who have acted in conformity with, and *in reliance upon*, such construction..., are not in any wise impaired...by reason of a change in the construction of the same statute made by a subsequent decision of the court of last resort...and the effect of the change in judicial construction is that it operates prospectively...in the same manner as though the statute or law had been amended by the legislature. [Emphasis added.]

See also, *Sumners*, *supra*, at 723, and cases there cited.

Trans UCU is consistent with the statutory construction/tort law dichotomy. There, the construction of the tax law changed, and the corporation which had relied on the earlier judicial construction of the law was not penalized for that reliance. In this case, however, by relying on a sixty-year old precedent that was reaffirmed less than a year prior to the trial of this case, plaintiffs were penalized for that reliance. If both changes in the law (statutory construction in *Trans UCU* and eliminating a tort theory of recovery here) are viewed as substantive changes in the law, which is what the Missouri Court of Appeals found, then the focus must be on whether there is a rational relationship between the differing treatment of these two groups.

This Court should determine whether it is constitutionally permissible under the Equal Protection Clause

to automatically apply changes in the construction of a statute prospectively so that persons who have relied on the prior construction are not "impaired" but to apply changes in tort law retroactively. In a statutory construction case, there appears to be only one factor for consideration, *i.e.*, reliance, whereas in a tort law case, all three *Chevron* factors are considered.

What this dichotomy means is that if there had been a statute which the Missouri Supreme Court expressly interpreted as authorizing recovery from a landowner under a vicarious liability theory when inherently dangerous activity was involved, and sixty years later, the interpretation of that statute was changed, *after* plaintiffs had won a $1,300,000 verdict based on that sixty-year-old construction, the jury award would not have been disturbed. But merely because no statutory construction was involved, yet with essentially the same sequence of events, the jury award for these children for the death of their father has been taken away.

This Court has said that a cause of action created by a state is at least arguably a species of property protected by the Due Process Clause. *Martinez v. California*, 444 U.S. 277, 100 S. Ct. 553, 557, 62 L. Ed.2d 481 (1980). Plaintiffs here had a cause of action established by *Mallory*. They exercised their property right under *Mallory* and filed suit. They went to

the time, trouble, expense, and emotional drain of a wrongful death suit for the loss of their father. They were successful, under the tort theory authorized by *Mallory* and reaffirmed by *Ballinger*. And they were then deprived of their cause of action by the retroactive application of *Zueck*.

If taking away the Plaintiffs' cause of action is considered substantive due process, there is no apparent relationship between any legitimate goal of the state, and the taking of the judgment. If the taking of this judgment is regarded as an issue of procedural due process, Plaintiffs had no notice and no opportunity to be heard before what they had worked so hard to obtain was taken away from them.

Justice Harlan, dissenting in *Poe v. Ullman*, 367 U.S. 497, 81 S. Ct. 1752, 1776-1777 (1961), said:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the balance which our Nation, built upon postulates of respect for the liberty of the individual, have struck between that liberty and the demands of organized society. If the supplying of content to this constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the

traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

...the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints [citations omitted]....

...

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come." [Citation omitted.]

Asserting a vested right in a jury verdict against a subsequent decision which takes away that verdict may not be

a "novel claim" in a literal sense, yet Justice Harlan's words are very relevant. Plaintiffs' right to the fruit of their labors, the judgment in their favor, is not a right clearly enunciated by explicit language in the Constitution, so there can be no "mechanical" answer to the question of whether the taking of the judgment from them was a denial of due process.

This Court should decide whether the Missouri Court of Appeals applied *Chevron* in a constitutionally permissible fashion, particularly with reference to that court's interpretation of the "clear past precedent"/"clearly foreshadowed" factor, and the "reliance" factor.

Section 3. The Issue of Remand

The issue of whether these minor plaintiffs were deprived of equal protection or due process rights under the Fifth and Fourteenth Amendments by the refusal of the Missouri Court of Appeals to remand the case in order to permit the Praysons to litigate their claim of direct liability on the part of KCP&L for the death of their father, was not raised before the trial court. It could not be, since a question of remand is a matter of decision by an appellate court. Given the denial of Plaintiffs' Motion for Rehearing and/or Transfer, and the Missouri Supreme Court's denial of Plaintiffs' Motion to

Transfer, the reality is that this Petition for a Writ of Certiorari is the first real opportunity to raise the issue.

As noted above, Plaintiffs were denied leave to file a direct liability claim against KCP&L, and proceeded to trial with their vicarious liability claim. Afterwards, when their judgment had been taken away from them, the Missouri Court of Appeals would not permit them to go forward with their claim of direct liability against KCP&L. Yet time and again, the Missouri Supreme Court has said that if there are facts which might warrant a recovery, a case should be remanded, and not merely reversed. For example:

> The rule stated in *Smith v. Terminal R. R. Ass'n of St. Louis*, Mo. App., 160 S.W.2d 476, 479, applies: "The furtherance of justice requires that a case should not be reversed without remanding unless the appellate court is convinced that the facts are such that a recovery cannot be had; and even though the plaintiff fails to substantiate the theory upon which his case wa tried, if he nevertheless shows a state of facts which might entitle him to recover if his case were brought upon a proper theory, the judgment will not be reversed outright, but instead, in the exercise of a sound judicial discretion, the case will be remanded to give him the opportunity to amend his petition, if so advised, so as to state a case upon the theory which the evidence discloses. [Citation omitted.]"

Smith v. Inter-County Telephone Company, 559 S.W.2d 518, 525 (Mo. 1977) (en banc). *See also, Kaufmann v. Nagle*, 807 S.W.2d 91, 95 (Mo. 1991) (en banc).

Plaintiffs argued to the Missouri Court of Appeals that the direct liability claim in Count I of the Second Amended Petition [Appendix Vol. 1 at 31], arguably stated a claim of direct or primary liability on the part of KCP&L under the safe workplace doctrine, "under which one who contracts with an independent contractor has a duty to provide a safe workplace for the employees of the independent contractor," *Donovan v. General Motors*, 762 F.2d 701 (8th Cir. 1985); the "retained possession" doctrine, Restatement (Second) Torts, §422 (1965); the "retained control" doctrine, Restatement (Second) Torts, §414 (1965), and under the theory that Mr. Bunger was a third-party beneficiary of the contract between KCP&L and B & L Electric which contained provisions mandating the safety procedures which were to be followed, and that KCP&L failed to provide B & L with those standards and procedures.

The Missouri Court of Appeals, however, chose to address only the theory that Mr. Bunger was a business invitee and to analyze the case from that perspective [Appendix Vol. 1 at 23-25], and found that Mr. Bunger knew just as much about the dangers of electricity as KCP&L and therefore there was no

need for KCP&L to provide him with any warnings. While noting that if KCP&L had undertaken to supervise or monitor the work of its independent contractor, as Plaintiffs alleged that KCP&L failed to do, KCP&L might have incurred liability, citing *Werdehausen v. Union Electric Company*, 801 S.W.2d 358, 364 (E.D. Mo. App. 1990), the Missouri Court of Appeals concluded that because Plaintiffs alleged that KCP&L failed to supervise or monitor, rather than that it did so in a negligent fashion, no cause of action was stated in Count I of the Second Amended Petition. [Appendix Vol. 1 at 25.]

What the decision of the Missouri Court of Appeals has done is to wipe out a verdict in favor of the Prayson children for the loss of their father, and erase the possibility that the Praysons might successfully plead and prove a direct liability theory against KCP&L. Under the particular circumstances of this case, where a theory of recovery in place for six decades is suddenly abolished, this Court should determine whether, considering the fact that Plaintiffs initially attempted to plead a claim of direct liability against KCP&L but were foreclosed from doing so, the Equal Protection and/or Due Process Clauses require that at a minimum they be given the chance to do so now.

In *Chevron*, the time and expenses connected with a year of discovery and the possibility of a substantial loss of earning power for the plaintiff was enough to mandate the nonretroactive application of this Court's decision in *Rodrigue.* This Court should decide whether the retroactive application of *Zueck* was constitutionally permissible, and if so, whether it was also constitutionally permissible to deny the Praysons the chance to plead and prove a direct liability claim against KCP&L.

Plaintiffs sought leave to file a Second Amended Petition, which included a direct liability claim against KCP&L in Count I, and an indirect or vicarious liability claim against KCP&L in Count II. [Appendix Vol. 1 at 31.] The trial court denied leave on the basis that Count I of the Second Amended Petition failed to state a cause of action [Appendix Vol. 1 at 43], apparently reasoning that the Missouri Supreme Court's decision in *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. 1990) (en banc) had abolished the possibility of direct liability claims against a landowner by an injured employee of an independent contractor. A Third Amended Petition was filed using *Ballinger* as a model, and the vicarious liability theory was the only one on which Plaintiffs were permitted to proceed to trial. They won under that theory.

During the course of the appeal, Plaintiffs argued unsuccessfully that if the appellate courts were going to take away their verdict through retroactive application of *Zueck*, then the case should have been remanded to permit Plaintiffs the opportunity to prove their claim of direct liability against KCP&L.

In the context of amendments to pleadings, this Court has said:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. [Citation omitted.] If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, "be freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 230, 9 L. Ed.2d 222 (1962). The Federal Rules are not involved in this case, of

course, but the spirit of them is, in the sense that the denial of an opportunity to plead and prove a direct liability claim against KCP&L takes on a constitutional dimension when connected with the deprivation of the jury's verdict under the retroactive application of *Zueck*.

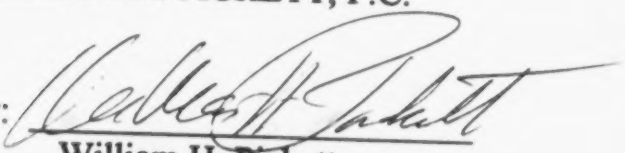
This case was not tried in the Circuit Court of Jackson County on any theory of direct liability. No evidence was presented to the trial court which could be reviewed by any appellate court concerning whether KCP&L could be held directly liable for the death of Mr. Bunger, because Plaintiffs were denied leave to amend their pleadings to state a direct liability claim. Regardless of whether Count I of the Second Amended Petition was artfully or inartfully written, under the particular facts of this case, this Court should decide whether Plaintiffs' due process or equal protection rights were violated by the failure to remand the case to allow them to pursue their direct liability claim, with or without further amendment of their pleadings.

CONCLUSION

This Petition for a Writ of Certiorari to the Western District of the Missouri Court of Appeals should be granted to determine whether the retroactive application of *Zueck v. Oppenheimer Gateway Properties, Inc.*, 804 S.W.2d 384 (Mo. 1991) (en banc), to take away the Praysons' wrongful death judgment was constitutionally permissible, and if so, whether it was then constitutionally permissible to refuse to remand the case to give the Praysons an opportunity to attempt to plead and prove their earlier claim of direct liability on the part of KCP&L for the death of Mr. Bunger.

Respectfully submitted,

WILLIAM H. PICKETT, P.C.

By: 

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92-2060

No. _____

Supreme Court, U.S.
FILED
JUN 21 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMIE MARIE (BUNGER) PRAYSON,
and JASON DEAN (BUNGER) PRAYSON,

Petitioners,

vs.

KANSAS CITY POWER & LIGHT COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI (Volume 1 of 2)

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MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Jamie Marie (Bunger) Prayson and Jason Dean Prayson	)	
Appellants,	)	
vs.	)	No. WD44932
Kansas City Power & Light Company,	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY

The Honorable K. Preston Dean, Judge

Before Ulrich, P.J.; Shangler and Fenner, JJ.

Jamie Marie Prayson and Jason Dean Prayson, siblings, appeal from the judgment n.o.v. in favor of defendant Kansas City Power & Light Company (KCP&L), following trial in which the jury's verdict awarded appellants $1,300,000 for the wrongful death of their father, Larry Dean Bunger. The Praysons contended that the trial court erred (1) in applying *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384 (Mo. banc 1991), retroactively, and (2) in finding that Count I of their second amended petition failed to state a cause of ac-

tion and denying their motion for leave to file the petition. The Missouri Supreme Court in *Zueck* directed that the inherently dangerous exception to the rule that a landowner is not liable to the injured employee of an independent contractor no longer applies where the employee is covered by workers' compensation insurance. *Id.* at 390.

The trial court's judgment n.o.v., applying *Zueck* retroactively, is affirmed.

Jason and Jamie (Bunger) Prayson are the natural children of Larry Dean Bunger. Mr. Bunger was an employee of B & L Electric, Inc. (B & L), an independent contractor hired by KCP&L to install lightning arrestors and to squirrel-proof certain transformers on KCP&L utility poles in the Kansas City area. Mr. Bunger was performing this work on January 18, 1985, when the non-insulated wrench he was holding in his right hand slipped off the de-energized bottom portion of a fuse mounting and came into contact with the top of the fuse mounting, which was still energized with electricity. Mr. Bunger was electrocuted.

Following Mr. Bunger's death the Praysons filed a claim for workers' compensation death benefits against B & L. The Praysons and B & L entered into a compromise structured

settlement of that claim which was approved by the Division of Workers' Compensation.

On January 15, 1988, the Praysons filed suit against KCP&L in a single-count petition alleging that KCP&L's negligence was the direct cause of Mr. Bunger's death. On January 23, 1991, the Prays sought leave of the trial court to file a Second Amended Petition, splitting their cause of action against KCP&L into Count I, alleging KCP&L was negligent and directly liable for Mr. Bunger's wrongful death, and Count II, alleging KCP&L was vicariously liable under the "inherently dangerous activity" doctrine. The trial court denied leave to amend on the ground that Count I failed to state a cause of action. The Praysons filed their Third Amended Petition on February 4, 1991, stating only a claim for vicarious liability, and proceeded to trial. On February 13, 1991, the jury rendered its verdict in favor of the Praysons in the amount of $2,000,000,. By finding Mr. Bunger to have been 35% at fault, the jury reduced the award to $1,300,000.

KCP&L filed a Motion for Judgment n.o.v., or in the alternative, for a new trial, on February 26, 1991. While these motions were pending, the Missouri Supreme Court handed down its decision in *Zueck* (decided May 3, 1991). The trial court held that the *Zueck* decision applied retroactively, and

therefore granted KCP&L's motion for judgment n.o.v. on May 24, 1991.

I.

The issue presented in point I is whether *Zueck* applies retroactively. If the accident which caused Mr. Bunger's death occurred today, under *Zueck*, KCP&L would not be vicariously liable for Mr. Bunger's death. However, Mr. Bunger's death occurred before the supreme court decided *Zueck*. *Zueck* instructs that a landowner who employs an independent contractor is not vicariously liable for the injuries sustained by an employee of the independent contract whose injuries are caused by an inherently dangerous condition if the employee is covered by Workers' Compensation Insurance. *Zueck*, 809 S.W.2d 390. The Praysons argue that *Zueck* is prospective because its teaching is procedural rather than substantive. They assert in the alternative that if *Zueck* is a substantive decision, it meets the three-prong test of *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. banc 1985), for prospective-only application.

Both the Eastern District and this Court have already determined the issue of whether *Zueck* applies retroactively. In *Aubuchon v. Hyland*, 820 S.W.2d 613 (Mo. App. 1991), the Eastern District applied the *Sumners* analysis to *Zueck* and found that "*Zueck* must be applied retroactively." *Id.* at 617.

This Court, concurring in the rationale expressed in *Aubuchon*, recently applied *Zueck* retroactively, also. *Goodrum v. Kansas City Power & Light Co.*, No. WD46115 (Mo. App. Oct. 20, 1992).

Further historical review and analysis of the courts' treatment of whether a landowner is vicariously liable to the injured employee of an independent contractor who is injured because of the inherently dangerous activity of the contractor may be helpful. At common law, one who contracts with an independent contractor is not liable for bodily harm caused by the torts of the contractor or the contractor's servants. *Zueck*, 809 S.W.2d at 384. An exception to the general rule exists where the activity undertaken by the independent contractor is inherently dangerous. *Id.* The common law subjects the landowner to liability for injuries resulting to innocent third parties caused by the independent contractor's failure to take special or reasonable precautions against inherent risks or dangers. *Id.*

Whether employees of independent contractors are included among "innocent third parties" to which landowners are vicariously liable has been answered both ways by the Missouri Supreme Court in the past. In *Salmon v. Kansas City*, 241 Mo. 14, 145 S.W. 16 (1912), the supreme court held that the inherently dangerous activity exception was not applicable

to servants of an independent contractor. *Id.* 145 S.W. at 24. Sixteen years later, the supreme court overruled *Salmon* and extended the inherently dangerous exception in *Mallory v., Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W.2d 617 (Mo. banc 1928), to employees of independent contractors, making the landowner vicariously liable for the employee's injuries. *Id.* 6 S.W.2d at 624-27. The supreme court abandoned *Mallory* in *Smith v. Inter-County Telephone Co.*, 559 S.W.2d 518 (Mo. banc 1977), where the court allowed the employee of an independent contractor a cause of action against a landowner only if the employee could show the landowner negligent failed to ensure that adequate precautions were taken to avoid injury from the inherently dangerous activity and that such negligence caused the employee's injury. *Id.* at 523. The supreme court returned to the *Mallory* standard in *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. banc 1990), eliminating *Smith's* requirement of owner negligence. *Id.* at 511. The supreme court's last pronouncement on the issue came sixty-three years after *Mallory* in *Zueck*, where the court held that in light of the advent of workers' compensation laws, the inherently dangerous exception no longer applies to employees of independent contractors covered by workers' compensation. *Zueck*, 809 S.W.2d at 388-90. The

supreme court overruled *Mallory* and all cases following *Mallory*. *Id.* at 390.

In *Sumners v. Sumners*, 701 S.W.2d at 723, the Missouri Supreme Court recognized the general rule that a change in the law by judicial decision is to be given retroactive effect. While acknowledging the general rule, the court also acknowledged it had the authority "to declare whether such decisions are retroactive or prospective 'based on the merits of each individual case,'" *Id.* at 723 (quoting *Keltner v. Keltner*, 589 S.W.2d 235, 2239 (Mo. banc 1979)), and noted that its approach to the "retroactive/prospective" issue has provided two exceptions to the general rule of retroactivity. *Sumners*, 701 S.W.2d at 723.

The first exception "is found when the change pertains to *procedural* as opposed to *substantive* law." *Id.* (emphasis added). Such procedural decisions are to be given prospective effect only. *State v. Shafer*, 609 S.W.2d 153, 157 (Mo. banc 1980). The second exception turns not on whether the change in the law is procedural or substantive, but on the issue of fundamental fairness. *Sumners*, 701 S.W.2d at 723. The supreme court adopted a three-part test to resolve the issue of fairness in determining whether an overruling decision should be given prospective-only effect:

> First, the decision in question must establish a new principle of law...by overruling clear past precedent.... Second, the Court must determine whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective operation. Third, the Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule.

Id. at 724 (citations omitted).

Aubuchon and *Goodrum* concluded that *Zueck* announced a substantive, not procedural, change in the law. *Aubuchon*, 820 S.W.2d at 616-17; *Goodrum*, No. WD46115, slip op. at 3-4. "The distinction between substantive law and procedural law is that 'substantive law relates to rights and duties which give rise to a cause of action,' while procedural law 'is the machinery for carrying on the suit.'" *Shepherd v. Consumers Coop. Ass'n*, 384 S.W.2d 635, 640 (Mo. banc 1964) (quoting *Barker v. St. Louis County*, 340 Mo. 986, 104 S.W.2d 371, 378 (1937)). Before *Zueck*, one who contracted with an independent contractor could be held vicariously liable, under the inherently dangerous exception, for the injuries sustained by the employees of the independent contractor. *See Mallory*, 6 S.W.2d at 624-27. Thus, a cause of action existed against

the owner for injuries suffered by the independent contractor's employees caused by an inherently dangerous condition. After *Zueck*, the inherently dangerous exception no longer applies to employees of independent contractor covered by workers' compensation. *Zueck*, 809 S.W.2d at 390. The common law general rule that one who contracts with an independent contractor has no vicarious liability for the torts of an independent contractor remains in force for employees covered by workers' compensation.

While a cause of action once existed against a landowner on a theory of vicarious liability for the torts of an independent contractor resulting from an inherently dangerous condition, after *Zueck*, that cause of action can no longer be asserted. Since *Zueck* extinguishes the rights of employees of independent contractors to bring a particular cause of action, *Zueck* states a substantive change in the law, and does not fall within *Sumners'* first exception to retroactive application.

The *Aubuchon* court also applied the three-part fundamental fairness test, the second *Sumners* exception. Once again, the court correctly found that fundamental fairness leads to retroactive application of *Zueck*.

The first factor in the *Sumners* fairness test to determine whether an overruling decision of the court should be given

prospective-only effect is whether the decision "establish[es] a new principle of law...by overruling clear past precedent...." 701 S.W.2d at 724 (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106, 92 S. Ct. 349, 355, 30 L. Ed.2d 296, 306 (1971)). In *Chevron*, the United States Supreme Court includes another method in the first factor by which a new principle of law may be established, and the conditions necessary for that method, to qualify for prospective-only application: "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, *...or by deciding an issue of first impression whose resolution was not clearly foreshadowed.*" *Chevron*, 404 U.S. at 106, 92 S. Ct. at 355, 30 L. Ed.2d at 306 (emphasis added). *Zueck* does not require retroactive application under either of the methods in *Sumners'* first fairness factor.

The *Aubuchon* court found that *Zueck* did not establish a new principle of law by overruling clear past precedent because *Zueck* "reflects a return to the state of the law pre-*Mallory*." *Aubuchon*, 820 S.W.2d at 617. By eliminating the inherently dangerous activity exception for the employees of independent contractors, *Zueck* does result in a return to the general common law rule in effect before *Mallory*. However, even if *Zueck* results in a new principle of law (in light of the fact

that the impact of workers' compensation the question of whether the employees of independent contractors are included in the inherently dangerous activity exception has not been considered by the Missouri Supreme Court before *Zueck*), this new rule is not established by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Although *Zueck* overrules *Mallory* and all cases following *Mallory*, neither *Mallory* nor *Ballinger*, which followed *Mallory*, can be considered clear past precedent on the issue of whether the inherently dangerous activity exception should be applied to employees of independent contractors covered by workers' compensation, the issue considered in *Zueck*. *Mallory* involved an accident suffered by an employee prior to the effective date of Missouri's first workers' law, and did not consider the impact of the new law. *Zueck*, 809 S.W.2d at 387. *Mallory* could not establish clear precedent on the issue presented in *Zueck*. While *Ballinger* was decided after the effective date of workers' compensation laws, "the dispositive issue [in *Zueck*]...was not before the court in *Ballinger*." *Zueck*, 809 S.W.2d at 387.

While *Zueck* may establish a new principle of law by deciding an issue of first impression, the resolution of this issue was clearly foreshadowed. As the *Zueck* court notes,

> With the advent of Workers' Compensation laws, most states have restricted the application of the inherently dangerous doctrine to its original concept—protection of innocent third parties not involved in the activity. Thus, under the law of those jurisdictions, employees of independent contractors may not recover from the landowner by invoking the inherently dangerous exception.

Id. The first part of the *Sumners* fundamental fairness test does not call for prospective-only application of *Zueck*.

The second consideration under the *Sumners* fundamental fairness test requires the court to determine whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective application. *Sumners*, 701 S.W.2d at 724. The court in *Aubuchon* found that:

> The purpose of *Zueck* is to promote the workers' compensation system, which is a product of trade-off: the employer (here an independent contractor) forfeits his common law defenses to suits against him for his employee's injuries and assumes automatic liability; the employee forfeits his right to a potentially lucrative common law judgment in return for assured compensation. *See Zueck* at 388. Retrospective operation enhances the purpose and effect of *Zueck* by upholding the balance the legislature previously struck in enacting the workers' compensation law.

Aubuchon, 820 S.W.2d at 617.

The Praysons argue that consideration of the relationship between workers' compensation law and the impact of the inherently dangerous activity doctrine was "an element" of the supreme court's decision in *Zueck*, but argue that it was not the "primary purpose" of *Zueck*. Rather, they contend the intent of the supreme court in *Zueck* was to eliminate the untenable position in which "innocent, non-expert" landowners who sought expert assistance from independent contractors had been placed by the application of the exception to employees of the contractors.[1]

Without addressing the validity of the argument advanced by the Praysons as the primary purpose of *Zueck*, this Court notes that although elimination of the difficult position the exception placed non-expert owners in may have been a consideration which lead to the holding in *Zueck*, it was not the primary purpose of the rule announced in *Zueck*. The supreme court limited its holding in *Zueck* to those employees of inde-

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[1]*See Zueck*, 809 S.W.2d at 387-88, where the court notes that the application of the inherently dangerous activity exception for employees of independent contractors creates an anomaly in the law. The court remarks that by permitting employees of independent contractors to invoke the exception, the law actually (1) rewards owners who, despite their lack of expertise, choose to perform work negligently resulting in injury to workers, (2) increases the risks to innocent third parties, and (3) punishes owners who seek expert assistance in an effort to avoid liability for injury. *Id.*

pendent contractors *covered by workers' compensation. Zueck*, 809 S.W.2d at 390. If the primary purpose of *Zueck* had been that which the Praysons suggest, it is doubtful the supreme court would have limited its holding as it did. Rather, the supreme court would have held the exception inapplicable to employees of independent contractors retained by non-expert landowners, regardless whether such employees are covered by workers' compensation.

Aubuchon determined that retroactive application of *Zueck* enhances its purpose and effect "by upholding the balance the legislature previously struck in enacting the workers' compensation law." *Aubuchon*, 820 S.W.2d at 617. Retroactive application corrects the distortion of the workers' compensation law created by application of the exception to employees of independent contractors who are covered by workers' compensation laws, as the supreme court found in *Zueck*:

> The application of the inherently dangerous exception also distorts workers' compensation laws. The exception, if extended to employees of an independent contractor, permits a limited class of injured workers—those who can convince a judge that their work for an independent contractor was inherently dangerous—to avoid the limitations of workers' compensation. This is contrary to the fact that the economic system permits workers who presume to undertake dangerous work to bargain for an enhanced reward for assuming the danger

> and despite the intended exclusivity of workers' compensation as an injured workers' remedy.

Zueck, 809 S.W.2d at 390 (footnote omitted). Permitting the Praysons to avoid the provision that workers' compensation is the single source of recovery by allowing them to pursue an additional enhanced common law judgment when an employee of KCP&L who is injured or killed during the performance of the same work done by Mr. Bunger would be limited to workers' compensation benefits would be inequitable. Retroactive application of *Zueck* to this case resolves that inequity.

Another factor considered by the supreme court in *Zueck* was the reality that owners pay for the workers' compensation insurance of independent contractors since such amounts are included in the independent contractor's bid. *Id.* at 389. Retroactive application of *Zueck* would give KCP&L benefit of its premium payment for workers' compensation insurance (through its payment of B & L's contract price) out of which the Prayson's benefits as Mr. Bunger's survivors were paid.

Applying *Zueck* to this case eliminates other inequities, considered by the *Zueck* court, that would result from including Mr. Bunger within the inherently dangerous exception. It

eliminates the inequity that would result if KCP&L were found "vicariously liable" under the exception, were required to pay the judgment, and then were deprived of indemnity from B & L, necessarily adjudged negligent, by reason of B & L's immunity under the workers' compensation laws. *See Zueck*, 809 S.W.2d at 388-89. Even if KCP&L were granted indemnity, as it contends it is entitled to by reason of its contract with B & L,[2] the inequities would continue, for B & L would be deprived of the immunity other employers are afforded under the workers' compensation laws.

The purpose and effect of *Zueck* will only be enhanced and cannot be retarded by applying its holding in this case. The second factor of the *Sumners* fairness test does not call for prospective-only operation of *Zueck*.

The third factor of the three-part fundamental fairness test announced in *Sumners* requires the court to balance the interests of those who may be affected by the change in the law. *Sumners*, 701 S.W.2d at 724. Specifically, the court must consider the degree to which parties may have relied on the old rule and weigh the hardships that could result from applying the new rule against the possible hardships to those parties who would be denied the benefit of the new rule. *Id.*

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[2]This Court does not address that claim.

The Praysons argue that because they relied on the law as it existed prior to *Zueck* in deciding whether to file suit and in choosing what form their suit would take, fundamental fairness requires the rule in *Zueck* not be applied to them. The Praysons cite the supreme court's decision in *Trans UCU, Inc. v. Director of Revenue*, 808 S.W.2d 374 (Mo. banc 1991), as support for their contention. Reliance of which *Sumners* speaks is a party's reliance on *settled* law in governing his or her conduct *before* an incident which gives rise to litigation occurs, not in deciding whether to pursue litigation after the incident. *Trans UCU* is not inconsistent with this Court's interpretation.

In *Trans UCU*, Trans UCU, Inc. (UCU), a Delaware corporation with its principal office in Kansas City, Missouri, purchased and took delivery of an airplane in Wilmington, Delaware in 1986, believing, in reliance on the supreme court's ruling in *King v. L & L Marine Service, Inc.*, 647 S.W.2d 524 (Mo. banc 1983), that by purchasing the plane out-of-state and by immediately placing it in interstate commerce the transaction was outside the reach of the Missouri use tax laws. *Trans UCU*, 808 S.W.2d at 375. In 1987, the supreme court overruled *L & L Marine* in *Director of Revenue v. Superior Aircraft Leasing Co.*, 734 S.W.2d 504 (Mo. banc 1987), making trans-

actions such as the one UCU engaged in taxable under Missouri's use tax. *Trans UCU*, 808 S.W.2d at 375. Based on the advice of its counsel, UCU believed that the *Superior Aircraft* ruling was prospective only and did not file a use tax return in Missouri in connection with its purchase and use of the aircraft. *Id.*

In 1988 the Director of Revenue attempted to apply *Superior Aircraft* retroactively and collect of $60,000 in use tax, plus interest and penalties, from UCU. *Id.* at 375-76. UCU protested, and the supreme court applied the *Sumners* tests and found that because UCU detrimentally relied on the law before *Superior Aircraft* and on the advice of its counsel after *Superior Aircraft*, it would be fundamentally unfair to apply *Superior Aircraft* retroactively to UCU. *Id.* at 377-78.

UCU relied on *L & L Marine* in deciding to purchase the airplane in Delaware and in deciding not to file a Missouri use tax return—conduct that occurred *before* litigation had begun. *Trans UCU* does not support the Prayson's argument that reliance on an old rule in bringing suit and in determining the form of litigation is the type of reliance in *Sumners* requiring prospective-only application of a new law.

Furthermore, UCU relied upon *settled* law; the Praysons did not. The supreme court had not addressed the impact of

workers' compensation laws upon the inherently dangerous activity exception before *Zueck*. *Zueck*, 809 S.W.2d at 388-90.

Examination of the hardships each party will incur upon the application of *Zueck* to this case is not persuasive to stray from the general rule of retroactivity. The application of *Zueck* still permits the Praysons' recovery for Mr. Bunger's death through workers' compensation. Both *Sumners* tests require that *Zueck* be applied retroactively.

As their final arguments under point I, the Praysons argue that (1) retroactive application of a change in tort law effected by a judicial decision constitutes a denial of equal protection, and (2) the trial court's granting of the j.n.o.v. constituted an unjust taking because the jury verdict in favor of the Praysons became a vested property right under the due process clauses. The Praysons fail to cite Missouri authority for either of these arguments. Point I is denied.

II.

The Praysons contend as their second point on appeal that the trial court erred in denying their motion requesting leave to file their Second Amended Petition.[3] The trial court

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[3]The Praysons contend in their second point relied on that the trial court erred in "DISMISSING APPELLANTS' FIRST COUNT IN THEIR PROPOSED SECOND AMENDED PETITION," but the trial court

denied the motion because the court found that Count I of the petition failed to state a cause of action.

KCP&L contends that even if the trial court erred in finding Count I of the Praysons' second amended petition failed to state a cause of action, the Praysons failed to preserve such error by filing a third amended petition which did not include the Count I allegations. KCP&L argues the Praysons "abandoned" their Count I allegations and waived any error committed by the trial court by filing a third amendment.

The general rule is that an amended petition operates as an abandonment of the original petition. *Scott v. Gibbons*, 611 S.W.2d 387, 389 (Mo. App. 1981). However, Missouri courts note an exception to the general rule. In *R.C. v. Southwestern Bell Telephone Co.*, 759 S.W.2d 617 (Mo. App. 1988), R.C. brought a lawsuit against several defendants. *Id.* at 619. The counts against some of the defendants were dismissed because the trial court held that the defendants were immune from suit. *Id.* As the appellate court noted, "[n]o amendment could correct that problem." *Id.* When R.C. amended her allegations against the remaining defendants, she did not include the previously-dismissed defendants and "thereby force those defen-

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actually denied a motion the Praysons filed seeking leave to file a second amended petition.

dants and the court to repeat the dismissal procedure they had previously engaged in." *Id.* The appellate court in *R.C.* found that R.C. did not abandon her cause of action against the dismissed defendants by amending her petition. *Id.* The court held:

> Where the reason for dismissal is not correctible [sic] by an amended pleading and the case remains pending against other defendants, the court and the parties should not be required to engage in useless procedural gestures in order to preserve the propriety of the dismissal for review.

Id. at 619-20.

An analogous situation is presented in this case. The trial court denied the Praysons' motion for leave to file their second amended petition because the trial court found that Count I failed to state a cause of action. From the transcript of the hearing, it is apparent that the trial judge believed that *Ballinger* precluded the Praysons from bringing a claim of direct liability against KCP&L. *Ballinger*, though, only eliminates the *Smith* requirement of showing negligence on the part of the owner to prevail in a claim based on pure vicarious liability. *Ballinger*, 788 S.W.2d at 511. Neither *Ballinger* nor *Zueck* preclude a claim of direct liability on the part of an owner for injury or death to a person engaged in inherently

dangerous activities on the owner's premises at the owner's behest. *See Zueck*, 809 S.W.2d at 391 (Blackmar, C.J., concurring).

The trial judge would not allow Count I to be filed. Rather than seek leave to file a third amended petition containing the Count I and then go through the exercise of having the trial court deny their motion again, the Praysons proceeded with their Third Amended Petition on Count II, alleging only the vicarious liability of KCP&L.

That the Praysons did not abandon Count I by filing the Third Amended Petition was even recognized by the trial judge, who stated "I have...allowed the filing of a third amended petition which is done with [the Praysons] waiving any of the issues that are presented by their request to file the second amended petition," and "I agree with [the Praysons] there was no abandonment in what they've done since it was coerced not voluntary."

In determining whether the Praysons stated a cause of action in Count I, every pleaded fact and every favorable inference which may reasonably be drawn from the facts pleaded is assumed true. *Kennedy v. Kennedy*, 819 S.W.2d 4406, 408 (Mo. App. 1991). If the facts pleaded and the reasonable infer-

ences show any ground that would entitle the Praysons to relief, the motion should not have been denied. *Id.*

While *Zueck* forecloses any claim against an owner under the inherently dangerous activity exception for *vicarious* liability, a claim against an owner for direct liability based on the owner's own negligence is still available. *See Zueck*, 809 S.W.2d at 391 (Blackmar, C.J., concurring). Mr. Bunger, as an employee of B & L, working on property owned by KCP&L was a business invitee. *Schneider v. Union Elec. Co.*, 805 S.W.2d 222, 226 (Mo. App. 1991). His status as business invitee entitled him to KCP&L's ordinary care to make its premises reasonably safe for use. *Id.* To make a case against an owner, an employee of an independent contractor, as a business invitee, must plead and prove (1) a dangerous condition existing on the owner's property which involves an unreasonable risk, (2) that the owner knew or by using ordinary care should have known of the condition, (3) that the owner failed to use ordinary care inn removing or warning of the danger, and (4) as a result the employee sustained injury. *Id.*

Count I of the Praysons' Second Amended Petition purports to allege the Praysons' cause of action against KCP&L for direct negligence. The Count alleges that Mr. [Bunger] was electrocuted when the non-insulated wrench he was holding

slipped off a de-energized fuze [sic] mounting and contact a fuze [sic] mounting that was energized. Mr. [Bunger] was installing lightning accessories and squirrel-proofing on a transformer when he was killed. Paragraph 7 of Count I alleges that installing lightning arrestors and squirrel-proofing transformers utility poles (the work B & L was hired to perform) was an inherently dangerous activity and involved a particular risk of injury to B & L employees performing the work. Paragraph 3 alleges KCP&L was and is in the business of generating, transmitting, distributing, and selling electricity. The specific allegations of negligence are listed in paragraph 9 (a) - (e). Paragraph 9 (a) - (e) state that KCP&L negligently:

> (a) failed to provide existing Kansas City Power & Light Company safety materials such as Safety Rules for Outside Physical Employees to employees of B & L Electric, Inc. such as Larry Dean Bunger;
>
> (b) failed to monitor B & L Electric, Inc. to insure that all work was performed in accordance with applicable safety standards and/or safety rules;
>
> (c) failed to promulgate standarized [sic] procedures for squirrel proofing transformers which incorporated safe methods of performing work and provide such procedures to B & L Electric, Inc.;
>
> (d) failed to supervise and/or monitor B & L Electric, Inc. to insure employees of B & L Electric, Inc. were utilizing insulated safety devices such as gloves or blan-

kets when working in an energized area on overhead power lines and equipment;

(e) failed to supervise and/or monitor B & L Electric, Inc. to insure that line work on or around energized lines and equipment was performed by qualified employee(s) of B & L Electric.

B & L was an independent contractor. As an independent contractor, KCP&L was not liable for damages caused by the tortious acts or omissions of B & L. *Nance v. Leritz*, 785 S.W.2d 790, 792-93 (Mo. App. 1990). KCP&L was no obligated to supervise the work performance of independent contractor B & L to determine that it was being performed in a manner that provided a safe work environment for B & L's employees. *Martin v. First Nat'l of Independence Co.*, 372 919, 923 (Mo. 1963); *McHugh v. National Lead Co.*, 60 F. Supp. 17, 23 (E.D. Mo. 1945), *appeal dismissed*, 154 F.2d 829 (8th Cir. 1946). Had KCP&L supervised or monitored B & L as the Praysons' allege it should have, KCP&L would have altered its independent contractor relationship with B & L and may have incurred liability. *Werdehausen v. Union Elec. Co.*, 801 S.W.2d 358, 364 (Mo. App. 1990). Those allegations in paragraph 9 of Count I that KCP&L should have supervised and/or monitored B & L fail to state a cause of action.

Assuming that a reasonable inference from the allegations is that KCP&L knew or should have known that the work it hired B & L to do required activity near dangerous electrically charged transformers and utility power lines and involved an inherently dangerous activity and a high risk of injury to employees of B & L, one cannot then reasonably assume from the specific allegations of negligence that B & L and Mr. Bunger were unaware of the danger of electrical current in transformers and utility power lines with which Mr. Bunger worked. B & L was hired as an independent contractor by KCP&L to place devices on or near electrical lines. Mr. Bunger's job included the placement of the devices on transformers located on utility power lines. Paragraph 8 of Count I of the proposed amended petition states that Mr. Bunger had de-energized the transformer on which he was working at the time of his death by opening the fuse on the fuse mounting. Mr. Bunger demonstrated knowledge necessary to perform his job safely. Mr. Bunger's knowledge of the danger was at least equal to that if KCP&L. For KCP&L to warn B & L and Mr. Bunger of the danger of electrical current in utility power lines and transformers on or near which work was to be performed would have been to warn them of an obvious danger which they already knew. B & L's knowledge of the danger and the

willingness of its employees to work within proximity of the danger was probably a reason for which the company was hired. The owner of a premises is under no duty to warn of dangers which an employee of an independent contractor was deemed to have foreseen as necessarily incidental to his employment. *McHugh v. National Lead Co.*, 60 F. Supp. at 22.

Count I of Appellant's Second Amended Petition did not state a cause of action. The trial court did not err in denying the Praysons' motion for leave to file their second amended petition.

The trial court's judgment n.o.v. is affirmed.

Robert G. Ulrich, Judge

All concur.

IN THE SUPREME COURT OF MISSOURI

No. 75649
W.D. No. 44932

January Session, 1993

Jamie Marie (Bunger) Prayson, et al., Appellants,

vs. (TRANSFER)

Kansas City Power & Light Company, Respondent.

Now at this day, on consideration of appellants' application to transfer the above-entitled cause from the Western District Court of Appeals, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January session thereof, 1993, and on the 23rd day of March, 1993, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 23rd day of March, 1993.

Thomas F. Simon, Clerk

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

ORDER

Defendant has filed a motion for summary judgment. The motion asserts that as a matter of law, defendant, and others who employ independent contractors, should not be liable for the injuries of the employees of the independent contractor.

Missouri law provides that someone who engages an independent contractor may be held liable for injuries to the employees of that contractor if the work involved is inherently dangerous. *Hofstetter v. Union Electric Co.* 724 S.W.2d 527 (Mo. App., 1986), *Mallory v. Louisiana Pure Ice and Supply Co., et al.*, 6 S.W.2d 617 (Mo. Banc, 1928).

Whether the Missouri courts have considered the arguments defendant is making is immaterial. Missouri law presently allows this type of lawsuit. This court is not empowered to change that law. Defendant's motion for summary judgment is **DENIED**.

DATE: January 10, 1991

PRESTON DEAN, JUDGE

Copies mailed to:

William Pickett
Robert Gingrich

GLADYS TYREE, Clerk

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

SECOND AMENDED PETITION FOR DAMAGES—WRONGFUL DEATH

Count I

(8109)

COME NOW the plaintiffs, Jamie Marie Bunger and Jason Dean Bunger, by and through their Next Friend and Mother, Mary Jane Prayson, and for Count I of this Petition for Damages against the defendant, state and allege:

1. That plaintiffs are residents of Jackson County, Missouri.

2. Plaintiffs are the natural children of decedent Larry Dean Bunger, and, therefore, the proper parties to bring this suit for wrongful death under §537.080(1) Mo.Rev.Stat., and plaintiffs bring this cause of action on behalf of all other proper

party plaintiffs who are entitled to join by virtue of the laws of the State of Missouri in this action for the wrongful death of Larry Dean Bunger.

3. That defendant Kansas City Power & Light Company is a corporation incorporated under the laws of the State of Missouri and, was and is, in the business of generating, transmitting, distributing, and selling electricity to its patrons throughout portions of the State of Missouri, including Jackson County, for use as power and lighting purposes, therefore, transacting business within the State of Missouri and that defendant has made and is making contracts within the State of Missouri; that defendant has committed tortious acts in the State of Missouri; that all of the foregoing acts give rise to the cause of action alleged by plaintiffs in this Petition; and further, that under §506.150 Mo.Rev.Stat., defendant has submitted itself to the jurisdiction of this Court.

4. That defendant was the owner of the wires, transformers and other equipment on a pole located at 9415 Richmond, Kansas City, Jackson County, Missouri and that these premises were under the exclusive control of the defendant by virtue of the work being done there.

5. At all times herein mentioned and on or about January 18, 1985, the plaintiffs' decedent, Larry Dean Bunger,

was an employee of B & L Electric, Inc. and was acting within the scope and course of his employment with B & L Electric, Inc.

6. That prior to January 18, 1985, defendant contracted with B & L Electric, Inc. for line work including the installing of lightning arrestors and squirrel proofing of the transformers on utility power lines.

7. That at all times herein mentioned, the work of installing lightning arrestors and squirrel proofing of transformers on utility power lines was an inherently dangerous activity and involved a high and particular risk of injuries to the employees of B & L Electric, Inc., unless special precautions were taken to guard against such risk of injury; that such inherently dangerous activities involved in the aforesaid installation of lightning arrestors and squirrel proofing of transformers on utility power lines at 9415 Richmond, Kansas City, Missouri, was reasonably necessary to the performance of the contract between the aforesaid defendant-owner of Kansas City Power & Light Company and B & L Electric, Inc.

8. That on or about January 18, 19885, at the site of the utility power line located at 9415 Richmond, Kansas City, Missouri, plaintiffs' decedent, Larry Dean Bunger, in the course and scope of his employment with B & L Electric, Inc.,

was engaged in installing lightning arrestors and squirrel proofing the transformer on the utility power line. While thus engaged, plaintiffs' decedent, Larry Dean Bunger, de-energized the transformer by opening the fuse on the fuse mounting, and while utilizing a non-insulated wrench with his right hand to loosen a bolt brought said non-insulated tool in contact with the top of the fuse mounting which was still energized with electricity. Because plaintiffs' decedent, Larry Dean Bunger, was working in the general vicinity of lethal and dangerous 7,200 volt electricity at all times while attempting to replace the wire from the bottom of the cutout to the top of the transformed, he was in close proximity to said electricity. Due to the negligent acts and omissions of defendant Kansas City Power & Light Company as specifically set forth herein, plaintiffs' decedent, Larry Dean Bunger, was electrocuted when his non-insulated crescent wrench slipped off of the bottom of the fuse mounting which was de-energized and made contact with the top of the energized fuse mounting which was still energized, thereby, because of its close proximity to the location where he was working, causing his death when contact with the non-insulated crescent wrench was made with the energized portion of the top of the fuse mounting.

(a) Negligently failed to provide existing Kansas City Power & Light Company safety materials such as Safety Rules for Outside Physical Employees to employees of B & L Electric, Inc. such as Larry Dean Bunger;

(b) Negligently failed to monitor B & L Electric, Inc. to insure all work was performed in accordance with applicable safety standards and/or safety rules;

(c) Negligently failed to promulgate standardized procedures for squirrel proofing transformers which incorporated safer methods of performing work and provide such procedures to B & L Electric, Inc.;

(d) Negligently failed to supervise and/or monitor B & L Electric, Inc. to insure employees of B & L Electric, Inc. were utilizing insulted safety devices such as gloves or blankets when working in an energized are on overhead power lines and equipment;

(e) Negligently failed to supervise and/or monitor B & L Electric, Inc. to insure that line work on or around energized liens and equipment was

performed by qualified employee(s) of B & L Electric, Inc.

10. That at all times herein mentioned, the death of plaintiffs' decedent, Larry Dean Bunger, was attended by aggravated circumstances.

11. That as a direct and proximate result of the aforementioned negligence and wrongdoing of defendant Kansas City Power & Light Company, plaintiffs Jamie Marie Bunger and Jason Dean Bunger have each suffered the following injuries, to wit:

(a) they have lost and will in the future suffer the loss of pecuniary support of their father; and

(b) they have suffered and will in the future suffer the loss of services, companionship, comfort, instruction, guidance, counseling, training, and support of their father.

12. That as a further direct and proximate result of the negligence and wrongdoing of defendant, as aforesaid, plaintiffs' decedent, Larry Dean Bunger, suffered pain of mind and body, and incurred expenses for medical care, the exact amount of which is unknown at this time, and necessary funeral expenses, all to the damage of the plaintiffs, and each of them, pursuant to §537.090 Mo.Rev.Stat.

13. Plaintiffs further allege under §537.090 Mo.Rev.Stat. that the trier of fact is entitled to consider the aggravated circumstances in determining the amount of damages to be allotted to plaintiffs.

WHEREFORE, plaintiffs, Jamie Marie Bunger and Jason Dean Bunger demand judgment against defendant Kansas City Power & Light Company in a sum that is fair and reasonable, taking into account the aggravated circumstances pertaining to the injuries suffered by Larry Dean Bunger, which proximately caused his death on January 18, 1985, for their costs herein incurred and expended, and for such other and further relief as the Court deems just and proper.

Count II

(Vicarious Liability)

COME NOW the plaintiffs and for Count II of this Second Amended Petition for Damages, allege and state as follows:

1-13. Plaintiffs incorporate by reference, as though fully set forth herein, paragraphs 1 through 7 of this Second Amended Petition for Damages.

14. That on or about January 18, 1985, at the site of the utility power line located at 9415 Richmond, Kansas City, Missouri, plaintiffs decedent, Larry Dean Bunger, in the course

and scope of his employment with B & L Electric, Inc., was engaged in installing lightning arrestors and squirrel proofing the transformer on the utility power line. while thus engaged, plaintiffs' decedent, Larry Dean Bunger, de-energized the transformer by opening the fuse on the fuse mounting, and while utilizing a non-insulated wrench with his right hand to loosen a bolt brought said non-insulated tool in contact with the top of the fuse mounting which was still energized with electricity. Because plaintiffs' decedent, Larry Dean Bunger, was working in the general vicinity of lethal and dangerous 7,200 volt electricity at all times while attempting to replace the wire from the bottom of the cutout to the top of the transformer, he was in close proximity to said electricity. Due to the negligent acts and omission of B & L Electric, Inc. as specifically set forth herein, plaintiffs decedent, Larry Dean Bunger, was electrocuted when his non-insulated crescent wrench slipped off of the bottom of the fuse mounting which was de-energized and made contact with the top of the energized fuse mounting which was still energized, thereby, because of its close proximity to the location where he was working, causing his death when contact with the non-insulated crescent wrench was made with the energized portion of the top of the fuse mounting.

15. Defendant Kansas City Power & Light Company had a non-delegable duty to prevent injury to third persons, such as the decedent Larry Dean Bunger, for the inherently dangerous activities performed by B & L Electric, Inc. in accordance with the purchase order between defendant Kansas City Power & Light Company and B & L Electric, Inc. and that the negligence of B & L Electric, Inc. is thereby imputed to defendant Kansas City Power & Light Company.

16. That B & L Electric, Inc. was negligent and careless in the following respects, to wit:

(a) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure appropriate insulted safety devices such as rubber gloves or blankets were in use when working on or around overhead power lines and equipment;

(b) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure work was performed in accordance with applicable safety standards;

(c) Negligently failed to promulgate standardized procedures for squirrel proofing transformers

which incorporated safe methods of performing such work;

(d) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure two qualified employees were on a pole when working on or around energized power lines and equipment;

(e) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure the crew foreman observed and directed the crew members when working in an energized area on a pole;

(f) Negligently failed to insure that the squirrel proofing work on the power pole at 9415 Richmond, Kansas City, Missouri, was performed by a qualified employee of B & L Electric, Inc.

17. That at all times herein mentioned, the death of plaintiffs' decedent, Larry Dean Bunger, was attended by aggravated circumstances.

18. That as a direct and proximate result of the aforementioned negligence of B & L Electric, Inc. which is imputed to defendant Kansas City Power & Light Company,

plaintiffs Jamie Marie Bunger and Jason Dean Bunger have each suffered the following injuries, to wit:

(a) they have lost and will in the future suffer the loss of pecuniary support of their father; and

(b) they have suffered and will in the future suffer the loss of services, companionship, comfort, instruction, guidance, counseling, training, and support of their father.

19. That as a further direct and proximate result of the negligence and wrongdoing of defendant, as aforesaid, plaintiffs' decedent, Larry Dean Bunger, suffered pain of mind and body, and incurred expenses for medical care, the exact amount of which is unknown at this time, and necessary funeral expenses, all to the damage of the plaintiffs, and each of them, pursuant to §537.090 Mo.Rev.Stat.

20. Plaintiffs further allege under §537.090 Mo.Rev.Stat. that the trier of fact is entitled to consider the aggravated circumstances in determining the amount of damages to be allotted to plaintiffs.

WHEREFORE, plaintiffs Jamie Marie Bunger and Jason Dean Bunger demand judgment against defendant Kansas City Power & Light Company in a sum that is fair and reasonable, taking into account the aggravated circumstances

pertaining to the injuries suffered by Larry Dean Bunger, which proximately caused his death on January 18, 1985, for their costs herein incurred and expended, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

William H. Pickett #21324
Steve A. Matalone, II #36374
WILLIAM H. PICKETT, P.C.
417 East 13th Street, Suite 400
Kansas City, MO 64106
816/221-4343
Fax #: 816/221-8258

ATTORNEYS FOR PLAINTIFFS

I hereby certify that a copy of the above and foregoing was mailed this ___ day of January, 1991, to:

Robert P. Gingrich, Esq.
Kansas City Power & Light Company
1330 Baltimore
P. O. Box 418679
Kansas City, MO 64141
ATTORNEYS FOR DEFENDANT

Attorney for Plaintiffs

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

ORDER

Before the Court is Plaintiffs Jamie and Jason Bunger's motion for leave to file a second amended petition.

Because Count I of Plaintiffs' Second Amended Petition fails to state a cause of action, Plaintiffs' motion is thereby **DENIED**.

DATE: January 28, 1991

_____

PRESTON DEAN, JUDGE

Copies mailed to:

Steve Matalone
Robert Gingrich

GLADYS TYREE, Clerk

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED PETITION

COME NOW plaintiffs, Jamie Marie Bunger and Jason Dean Bunger, and hereby respectfully submit the following Suggestions in Support of Plaintiffs' Motion for Leave to File Third Amended Petition for Damages.

Pursuant to Rule 55.33(a), Mo.R.Civ.P., plaintiffs are requesting leave to amend their Petition for Damages to conform the Petition with the Supreme Court decision in *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. 1990). (See Exhibit A, Third Amended Petition for Damages.) In addition, plaintiffs have deleted the allegations

of direct negligence contained in Count I of plaintiffs' proposed Second Amended Petition in accordance with the Court's Order denying leave to file plaintiffs' proposed Second Amended Petition. (See attached Exhibit "B").

The purpose of Rule 55.33(a) is to allow matters to be presented which were overlooked or unknown to the party or parties when the first pleading was filed. *DeArmon v. City of St. Louis*, 525 S.W.2d 795, 802 (Mo. Ct. App. 1975); *Bohrman v. Schremp*, 666 S.W.2d 30 (Mo. Ct. App. 1984).

Rule 55.33 states in pertinent part:

> (a) **Amendments.** A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend at any time within twenty days after it is served. Otherwise a party may amend his pleading only by leave of Court or by written consent of the adverse party; *and leave shall be freely given when justice so requires*. (Emphasis added).

In the instant action, plaintiffs completed the depositions of employees of defendant and B & L Electric, Inc. in January,

1991. During the depositions information was gleaned, of which plaintiffs were unaware, as to the nature and extent of the negligence of B & L Electric, inc. which necessitates amending the Petition to clarify same.

Plaintiffs seek to conform the allegation of negligence on the theory of the inherently dangerous activity doctrine as set forth and clarified in the case of *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. 1990) (en banc). The original Petition and Amended Petitions filed by plaintiffs alleges only the direct negligence of defendant and pursuant to the Supreme Court decision in *Ballinger* defendant can be held vicariously liable based upon the negligence of the independent contractor hired by defendant to perform the inherently dangerous activity. The deposition of plaintiffs' expert, Dr. Thomas Browne, was taken on January 11, 1991, and in light of the opinions given plaintiffs seek to amend the Petition clarifying the allegations and narrowing the issues at trial. This amendment should come as no surprise to defendant as defendant was advised at the deposition on January 11, 1991, that plaintiffs would seek to amend in conformity with the opinions expressed by plaintiffs' expert. When an amendment would come as no surprise to a defendant it should be liberally

granted. *Jordan v. Robert Half Personnel*, 615 S.W.2d 574 (Mo. Ct. App. 1981).

The claims raised in plaintiffs' proposed Second Amended Petition relate back to the filing of the original pleading. Rule 55.33, Mo.R.Civ.P., provides in pertinent part:

> (c) **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

The law in the State of Missouri is clear. In *Koerper & Company v. United International*, 739 S.W.2d 705 (Mo. 1987) (en banc), the Missouri Supreme Court, in a unanimous decision, decided that an amended pleading relates back to the time of filing of the original pleading when the amended pleading arises out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. In the instant case, until extensive discovery was completed and the *Ballinger* decision was announced, plaintiffs were unable to seek an amendment clarifying the allegations. Here plaintiffs merely seek to conform the Petition against defendant to the law of Missouri. For the above and foregoing reasons,

plaintiffs' Motion for Leave to File Third Amended Petition should be granted.

Respectfully submitted,

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I hereby certify that a copy of the above and foregoing was hand delivered this 31st day of January, 1991, to:

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Attorney for Plaintiffs

92-2060

(3)

No. _____

Supreme Court, U.S.
FILED
JUN 21 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

**JAMIE MARIE (BUNGER) PRAYSON,
and JASON DEAN (BUNGER) PRAYSON,**

Petitioners,

vs.

KANSAS CITY POWER & LIGHT COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI (Volume 2 of 2)

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

THIRD AMENDED PETITION FOR DAMAGES—WRONGFUL DEATH

(Vicarious Liability)
Ballinger v. Gascosage Electric Cooperative,
788 S.W.2d 506 (Mo. 1990)
(8109)

COME NOW the plaintiffs, Jamie Marie Bunger and Jason Dean Bunger, by and through their Next Friend and Mother, Mary Jane Prayson, and for this Third Amended Petition for Damages against the defendant, state and allege:

1. That plaintiffs are residents of Jackson County, Missouri.

2. Plaintiffs are the natural children of decedent Larry Dean Bunger, and, therefore, the proper parties to bring this suit for wrongful death under §537.080(1) Mo.Rev.Stat., and

plaintiffs bring this cause of action on behalf of all other proper party plaintiffs who are entitled to join by virtue of the laws of the State of Missouri in this action for the wrongful death of Larry Dean Bunger.

3. That defendant Kansas City Power & Light Company is a corporation incorporated under the laws of the State of Missouri and, was and is, in the business of generating, transmitting, distributing, and selling electricity to its patrons throughout portions of the State of Missouri, including Jackson County, for use as power and lighting purposes, therefore, transacting business within the State of Missouri and that defendant has made and is making contracts within the State of Missouri; that defendant has committed tortious acts in the State of Missouri; that all of the foregoing acts give rise to the cause of action alleged by plaintiffs in this petition; and further, that under §506.150 Mo.Rev.Stat., defendant has submitted itself to the jurisdiction of this Court.

4. That defendant was the owner of the wires, transformers and other equipment on a pole located at 9415 Richmond, Kansas City, Jackson County, Missouri, and that these premises were under the exclusive control of the defendant by virtue of the work being done there.

5. At all times herein mentioned and on or about January 18, 1985, the plaintiffs' decedent, Larry Dean Bunger, was an employee of B & L Electric, Inc. and was acting within the scope and course of his employment with B & L Electric, Inc.

6. That prior to January 18, 1985, defendant contracted with B & L Electric, Inc. for line work including the installing of lightning arrestors and squirrel proofing of the transformers on utility power lines.

7. That at all times herein mentioned, the work of installing lightning arrestors and squirrel proofing of transformers on utility power lines was an inherently dangerous activity and involved a substantial risk of damage to the employees of B & L Electric, Inc., unless special precautions were taken to guard against such risk; that such inherently dangerous activities involved in the aforesaid installation of lightning arrestors and squirrel proofing of transformers on utility power lines at 9415 Richmond, Kansas City, Missouri, was reasonably necessary to the performance of the contract between the aforesaid defendant-owner Kansas City Power & Light Company and B & L Electric, Inc.

8. That on or about January 18, 1985, at the site of the utility power line located at 9415 Richmond, Kansas City,

Missouri, plaintiffs' decedent, Larry Dean Bunger, in the course and scope of his employment with B & L Electric, Inc., was beginning the process of squirrel proofing the transformer on the utility power line. While thus involved, plaintiffs' decedent, Larry Dean Bunger, de-energized the transformer by opening the fuse on the fuse mounting, and while utilizing a non-insulated wrench with his right hand to loosen a bolt and pad, the wrench slipped and came in contact with the top of the fuse mounting which was still energized with electricity. Because plaintiffs' decedent, Larry Dean Bunger, was working in the general vicinity of lethal and dangerous 7,200 volts or more of electricity at all times while attempting to replace the wire from the bottom of the cutout to the top of the transformer, he was in close proximity to said electricity. Due to the negligent acts and omissions of B & L Electric, Inc. as specifically set forth herein, plaintiffs' decedent, Larry Dean Bunger, was electrocuted when his non-insulated crescent wrench slipped off of the bottom of the fuse mounting which was de-energized and made contact with the top of the energized fuse mounting which was still energized, thereby, because of its close proximity to the location where he was working, causing his death when contact with the non-insulated

crescent wrench was made with the energized portion of the top of the fuse mounting.

9. Defendant Kansas City Power & Light Company had a non-delegable duty to prevent injury to third persons, such as the decedent Larry Dean Bunger, because of the inherently dangerous activities to be performed by B & L Electric, Inc. in accordance with the purchase order between defendant Kansas City Power & Light Company and B & L Electric, Inc. and that the negligence of B & L Electric, Inc. is thereby imputed to defendant Kansas City Power & Light Company.

10. That B & L Electric, Inc. was negligent and careless in the following respects, to wit:

(a) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure appropriate insulated safety devices such as rubber gloves or blankets were in use when working on or around overhead power lines and equipment that were energized with 7,200 volts or more;

(b) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure work around energized areas with 7,200

volts or more was performed in accordance with applicable safety standards;

(c) Negligently failed to promulgate mandatory standardized procedures such as de-energizing the fuse mounting by removing the tap/pelican from the primary power line when squirrel proofing transformers;

(d) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure two qualified employees were on a pole when working on or around energized power lines and equipment that were energized with 7,200 volts or more;

(e) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure the crew foreman observed and directed the crew members when working in an energized area on a pole that was energized with 7,200 volts or more;

(f) Negligently instructed Larry Bunger to begin the squirrel proofing procedure without removing the primary line tap/pelican to de-energize the area around where he was working;

(g) Negligently supervised Larry Bunger through his journeyman, Robert Berndt, and foreman, George Kirkwood, in failing to direct Larry Bunger to de-energize the area around where he was working by removing the primary line tap/pelican;

(h) Negligently allowing the squirrel proofing procedure to oftentimes be participated in by Larry Bunger, Robert Berndt and George Kirkwood without de-energizing the area below the primary line but instead only de-energizing the area below the bottom of the fuse mounting;

(i) Negligently failing to obtain defendant Kansas City Power & Light Company safety work rules pursuant to contract with Kansas City Power & Light Company and union contract and to enforce Kansas City Power & Light Company rules for the work Larry Bunger was doing;

(j) Negligently failed through supervisor, Mike Kiely, to inform B & L Electric, Inc. employees, including George Kirkwood, Robert Berndt and Larry Bunger, that Kansas City Power & Light Company work and safety rules that made mandatory the removal of primary line

tap/pelican to de-energize the area below the primary line was to be followed without deviation on all squirrel proofing work or place insulating material between the worker and the energized area.

11. That as a direct and proximate result of the aforementioned negligence of B & L Electric, Inc. which is imputed to defendant Kansas City Power & Light Company, plaintiffs Jamie Marie Bunger and Jason Dean Bunger have each suffered the following injuries, to wit:

(a) they have lost and will in the future suffer the loss of pecuniary support of their father; and

(b) they have suffered and will in the future suffer the loss of services, companionship, comfort, instruction, guidance, counseling, training, and support of their father.

12. That as a further direct and proximate result of the negligence and wrongdoing of B & L Electric, Inc. which is imputed to defendant, as aforesaid, plaintiffs' decedent, Larry Dean Bunger, suffered pain of mind and body, and incurred expenses for medical care, the exact amount of which is unknown at this time, and necessary funeral expenses, all to the

damage of the plaintiffs, and each of them, pursuant to §537.090 Mo.Rev.Stat.

13. Plaintiffs further allege under §537.090 Mo.Rev.Stat. that the trier of fact is entitled to consider the aggravating circumstances in determining the amount of damages to be allotted to plaintiffs.

WHEREFORE, plaintiffs Jamie Marie Bunger and Jason Dean Bunger pray for judgment against defendant Kansas City Power & Light Company in a sum that is fair and reasonable, taking into account the aggravating circumstances pertaining to the injuries suffered by Larry Dean Bunger, which proximately caused his death on January 18, 1985, for their costs herein incurred and expended, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

I hereby certify that a copy
of the above and foregoing
was hand delivered this 29th
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ATTORNEYS FOR DEFENDANT

_____
Attorney for Plaintiffs

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

JUDGMENT

Plaintiffs appeared in person and by attorneys, William Pickett and Steve A. Matalone. Defendant Kansas City Power & Light appeared by its attorneys, Robert Gingrich and Derek Woods.

A jury was empanelled and sworn. The parties made their opening arguments. The plaintiffs presented evidence and rested. Plaintiffs' motion for directed verdict at the close of plaintiffs' evidence was **DENIED**. Defendant's motion for directed verdict at the close of plaintiffs' evidence was **DENIED**.

The defendant presented evidence and rested. Plaintiffs' motion for directed verdict at the close of all evidence as to

statutory employee was **GRANTED**. Defendant's motion for directed verdict at the close of all evidence was **DENIED**.

The jury was instructed and closing arguments were heard. The jury retired to deliberate and returned the following verdicts:

VERDICT: "On the claim of the survivors of Larry Bunger for his fatal injury, we, the undersigned jurors assess percentages of fault as follows: Defendant Kansas City Power and Light (for the conduct of B & L Electric, Inc. 65%; Survivors' Decedent Larry Bunger 35%. Total 100%.

We, the undersigned jurors, find the total amount of Larry Bunger's survivors' damages disregarding any fault on the part of survivors' decedent Larry Bunger to be $2 million. (11 signatures)

The jury was discharged.

A judgment for plaintiffs for $1,300,000 was entered orally following the verdict on February 11, 1991.

IT IS THEREFORE ORDERED that judgment be entered for Plaintiffs Jamie Marie Prayson and Jason Dean Prayson in the amount of $1,300,000.

Each party shall bear its own cost.

Let execution issue.

DATE: February 13, 1991

PRESTON DEAN, JUDGE

Copies mailed to:

William Pickett
Robert Gingrich

GLADYS TYREE, Clerk

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

SUGGESTIONS IN OPPOSITION TO RETROACTIVE APPLICATION OF ZUECK v. OPPENHEIMER GATEWAY PROPERTIES, INC., TO THIS CASE

On February 11, 1991, a jury verdict was entered in this case in favor of Plaintiffs; on the same day, judgment was entered pursuant to Mo. R. Civ. P. 78.04. On May 3, 1991, the Supreme Court of Missouri handed down the decision in *Zueck v. Oppenheimer Gateway Properties, Inc.*, -- S.W.2d -- (Mo. 1991) (en banc), expressly holding that an owner cannot be held vicariously liable for the injury or death of an employee of an independent contractor, under the doctrine of inherent danger, where the injury or death fell within workers' compensation coverage. The question is whether *Zueck* is applicable to this case.

Plaintiffs respectfully suggest it is not.

First of all, application of *Zueck*, resulting in overturning the jury's verdict in this case, would be a denial of Plaintiffs' due process rights under Article I, §10 of the Constitution of the State of Missouri and the Fifth and Fourteenth Amendments to the Constitution of the United States. This case was tried under, and with the Court and counsel relying upon, existing case law, which has subsequently been overruled by *Zueck*. But because the verdict was rendered and judgment entered prior to the *Zueck* decision date, Plaintiffs have a vested property right in that judgment. A taking of that right, first, without just compensation, and second, without notice, prior to Plaintiffs' entering into the time, trouble and expense of litigation, that they would be deprived of their remedy against Defendant Kansas City Power & Light Company (hereinafter, "KCP&L"), is a denial of due process.

The fact situation in this case is analogous to the facts in *Arie v. Intertherm, Inc.*, 648 S.W.2d 142 (E.D. Mo. App. 1983). In *Arie*, the plaintiff had obtained a judgment for punitive damages, and a statute took effect after entry of judgment prohibiting punitive damages. The Eastern District held at 159 that the plaintiff had a "vested right" in the punitive damage award. Although *Arie* involved the Missouri constitutional provision banning ex post facto laws, conceptually the circumstances are similar. Plaintiffs here have a substantive, vested right in the jury verdict which should not

be wiped out by the retroactive application of the elimination of the theory of vicarious liability involved in this case.

Second, this case was filed under the wrongful death provisions of §537.080(1), R.S.Mo. 1986. It is suggested that *Zueck* can be interpreted to be restricted solely to claims by those who are employees of the independent contractors, and not to their survivors. In view of the comparatively recent amendments to the Wrongful Death Act, *i.e.*, 1979, if the General Assembly had wanted to usurp the rights of the survivors in this type of factual setting, it would have done so. But since it is clear that under the law that existed at the time of the death of Plaintiffs' decedent, he could have sued for damages had he survived, then it is equally clear that Plaintiffs herein have a statutory right to proceed with this case. And it would be a serious denial of due process to retroactively take away a right granted to Plaintiffs by a clear and unequivocal statute.

Third, regardless of whether *Zueck* is considered a change of procedural law or substantive law, it has prospective application only, *i.e.*, to causes of action accruing after May 3, 1991, or at most, limited retroactive application to trials occurring after that date.

> Missouri has adopted the substantive versus the procedural rule, which provides that if there be a subsequent overruling decision dealing with substantive principles of law, then the subsequent decision is retroactive in effect...

Bethell v. Porter, 595 S.W.2d 369, 375 (W.D. Mo. App. 1980). The Supreme Court has the authority, even though an overruling decision deals with substantive principles of law, to declare that the decision shall have prospective effect only. *Koebel v. Tieman Coal & Material Company*, 85 S.W.2d 519, 524 (Mo. 1935); *see also, Keltner v. Keltner*, 589 S.W.2d 235, 239 (Mo. 1979) (en banc). In making the determination (prospective or retroactive):

> ...the decision should be based on the merits of each individual case [citations omitted]. Generally, it is considered "undesirable to give retroactive effect to overruling decisions, except under the most compelling circumstances." [Citations omitted].

Id.

> It has often been held that where particular persons have acted in justifiable reliance on a subsequently overruled judicial decision and retroactive application of the overruling decision would defeat their reliance interests, such reliance interests should receive adequate protection, and the overruling decision should be denied retroactive application in order to prevent such persons from being subject to unfairness or undue hardship.

Id. at 240.

If the Supreme Court fails to indicate in the decision creating the new rule whether application of the rule is to be retrospective or prospective, the determination hinges on the question of whether the change relates to substantive or procedural law. *State v. Walker*, 616 S.W.2d 48, 49 (Mo. 1981) (en banc).

> "The distinction between substantive law and procedural law is that 'substantive law relates to rights and duties which give rise to a cause of action,' while procedural law 'is the machinery for carrying on the suit.'" [Citations omitted].

Roth v. Roth, 571 S.W.2d 659, 672 (E.D. Mo. App. 1978). And the Supreme Court has established standards for determining whether a new rule of law is to be applied prospectively or retrospectively:

> In order to clarify the issues regarding the operation of judicial decisions, we adopt a three-factor test to determine whether an overruling decision of this Court should be given prospective-only effect. First, the decision in question "must establish a new principle of law...by overruling clear past precedent...." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). Second, the Court must determine whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective operation. [Citation omitted]. Third, the Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which the parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule. [Citation omitted].

Sumners v. Sumners, 701 S.W.2d 720, 724 (Mo. 1985) (en banc).

Plaintiffs' position is: (1) the *Zueck* decision involves procedural law, and therefore may only be prospectively applied; (2) if *Zueck* is considered as a change in substantive

law, then application of the *Sumners* test precludes retroactive application.

Plaintiffs do not at this time have any precedent which suggests that elimination of the doctrine of an owner's vicarious liability in this factual setting is a question of procedural law. Plaintiffs do, however, suggest that this is simply a procedural matter, and not a question of substantive law. Even after *Zueck*, plaintiffs (using the word in a general sense, and not referring to Plaintiffs herein) have not lost a remedy for injury or death in an owner/independent contractor-inherently dangerous activity setting. The procedure to be followed now is solely filing a claim for workers' compensation. What has been altered by *Zueck* is the elimination of an alternate or additional procedure, i.e., filing suit in a circuit court. The Court is not saying in *Zueck* that an owner has no liability to the injured employee of the independent contractor, but rather that the owner's liability has been discharged through payment of the workers' compensation premiums under the contract with the independent contractor.

If this change is deemed to be a substantive change in the law, then under *Sumners* it should still be applied prospectively.

Zueck clearly satisfies the threshold test in *Sumners* for prospective application since multiple prior decisions of the appellate courts have allowed recovery where the injury to, or death of, the employee of the independent contractor occurred while the employee was engaged in inherently dangerous activity. *See, e.g., Mallory v. Louisiana Pure Ice & Supply*

Company, 6 S.W.2d 617 (Mo. 1928) (en banc); *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. 1990) (en banc).

The second test also suggests that prospective application is appropriate here, especially when a verdict has been rendered and a judgment entered prior to *Zueck*. The Supreme Court adopted this change to eliminate the doctrine of the *vicarious* liability of owners, under which an owner could be held liable for greater damages to an injured employee of an independent contractor, than for injuries to one of its own employees engaged in exactly the same inherently dangerous work. Prospective operation of the rule to cases in which injury or death occurs after the date of *Zueck*, or limited retroactivity, for those cases where the injury or death occurred prior to the date of *Zueck*, but there has been no verdict and judgment, would enhance the purpose and effect of the rule. Potential litigants and their counsel could avoid the time, trouble and expense of a trial where the sole issue was vicarious liability under the inherently dangerous activity doctrine. Erasing jury verdicts which are based on application of the prior law does nothing to promote the purpose and effect of the new rule; rather, it only serves to harm the successful plaintiffs.

The third test is the crucial one in this case, and it is also satisfied in favor of prospective application of *Zueck*. Plaintiffs relied on the prior law in filing their suit. As the *Sumners* Court commented, *supra*, "Reliance 'bespeaks a voluntary choice of conduct by the person harmed. It infers that the per-

son exercising it can decide between available alternatives.' [Citation omitted]."

Plaintiffs here had four choices available to them prior to the actual filing of this suit: (1) to consider the workers' compensation award sufficient, and go no further; (2) to file suit against KCP&L solely on a theory of direct liability; (3) to file suit against KCP&L solely on a theory of vicarious liability under the inherently dangerous activity doctrine, or (4) to combine the latter two theories in a single suit. Plaintiffs selected the fourth option. Had *Zueck* been handed down prior to the filing of this suit, Plaintiffs would have had only two options, and might well have decided not to pursue any claim against KCP&L.

Attorneys clearly relied on the prior law in advising their clients in cases of injury or death where there was an owner/independent contractor relationship, coupled with inherently dangerous activity. Plaintiffs here had alternatives available to them, and made their choice because that was what the law allowed at the time they were in the process of making the decision on whether or not to file suit. It would be a great and manifest injustice to say that Plaintiffs, who undertook the time, trouble, stress and expense of litigation, should now be penalized and have the jury's verdict taken away from them merely because the rule of law applicable to their theory of recovery has changed since the jury made its decision and judgment was entered.

Considering all the elements of *Sumners* and the principles stated above, *Zueck* is not applicable to this case.

Defendant KCP&L is not entitled to judgment notwithstanding the verdict on the basis of *Zueck*, nor, for all the reasons previously stated, should KCP&L be granted either a new trial or a judgment n.o.v.

Respectfully submitted,

WILLIAM H. PICKETT, P.C.

By: _____

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_____

David T. Greis

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

ORDER

Defendant has moved for judgment notwithstanding the verdict or in the alternative for a new trial. The decision of the Missouri Supreme Court en banc, in *Stephen Zueck v. Oppenheimer Gateway Properties*, No. 73226 decided May 3, 1991, requires that judgment notwithstanding the verdict be granted for defendant. *Zueck* overruled *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. Banc 1990) and *Mallory v. Louisiana Pure Ice and Supply Co.*, 6 S.W.2d 617 (Mo. Banc 1928). This court relied on *Ballinger* and *Mallory* to deny defendant's motion for summary judgment. Without those cases the motion for summary judgment would have been granted.

The decision in *Zueck* does not state whether it is to be applied retroactively. When the Court does not state whether the ruling is to be applied retroactively the question is whether the ruling is procedural or substantive. If procedural it is prospective only. If substantive it may be prospective or retroactive. *State v. Walker*, 616 S.W.2d 49 (Mo. Banc, 1981)

A substantive ruling relates to the rights and duties which give rise to a cause of action. A procedural ruling provides the machinery for carrying out suit. *Roth v. Roth*, 571 S.W.2d 659. (Mo. App. 1978)

Here the decision is substantive. It completely removes a particular cause of action. The ruling to achieve its purpose must be applied retroactively. Retroactive application here is appropriate under the test of *Sumners v. Sumners*, 701 S.W.2d 720, 274 (Mo. Banc. 1985).

The fact that plaintiffs brought suit and obtained a judgment in reliance on the overruled cases does not keep *Zueck* from being applied retroactively. *Simpson v. Revco Drug Centers of Missouri, Inc.*, 702 S.W.2d 482 (Mo. App. 1985); *Shaffer v. Sears Roebuck*, 689 S.W.2d 683 (Mo. App. 1985). Therefore the verdict of the jury must be set aside and judgment **GRANTED** to defendant. Costs will be taxed to plaintiff.

The other grounds asserted by defendant do not provide a basis for relief and except for the decision of *Zueck* the trial verdict would remain.

DATE: May 24, 1991

PRESTON DEAN, JUDGE

Copies mailed to:

William Pickett
Robert Gingrich

GLADYS TYREE, Clerk

IN THE SUPREME COURT OF MISSOURI

JAMIE MARIE (BUNGER) PRAYSON, *et al.*,	)	
Appellants,	)	
vs.	)	Supreme Court No. ___
	)	Court of Appeals,
	)	Western District
	)	Circuit Court of Jackson
KANSAS CITY POWER & LIGHT COMPANY,	)	County
Respondent.	)	

APPLICATION FOR TRANSFER COVER SHEET

Transfer is sought after opinion.

The record on appeal was filed:	1/30/92
The Court of Appeals opinion was filed:	12/22/92
The Motion for Rehearing was filed:	1/6/93
and ruled on:	2/2/93
The Motion for Transfer was filed:	1/6/93
and ruled on:	2/2/93

PARTIES TO THE CASE

PARTY [FILING MOTION]

Jamie Marie Prayson and Jason Dean Prayson (formerly Bunger), by and through their mother and next friend, Mary Jane Prayson. [Plaintiffs-Appellants]

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I. ISSUES WHICH THIS COURT SHOULD DECIDE

1. Does *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384 (Mo. 1991) (en banc), apply to "expert" land owners as well as the non-expert owners at issue in *Zueck*?

2. Does retroactive application of *Zueck* deny Appellants' due process and equal protection rights by taking away a $1,300,000 verdict awarded 3 months prior to *Zueck*?

3. Is the "reliance" test in *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. 1985) (en banc), limited to conduct prior to the event which gives rise to the litigation (here, the death of Mr. Bunger), or does it also apply to post-event conduct, such as consulting an attorney and deciding whether and how to proceed with suit, and on what theories?

4. Did the Court of Appeals properly add a "foreshadowing" criterion to the process of determining the retroactivity of an overruling decision of this Court, *i.e.*, *Zueck* was "foreshadowed" by the passage of the Workers' Compensation Act in 1928, and the adoption by other states of the *Zueck* principles, and therefore Appellants could not rely on the then-current state of the law in determining whether to proceed with suit against KCPL on the inherently dangerous activity/vicarious liability theory.

5. Does the *Keltner v. Keltner*, 589 S.W.2d 235, 239 (Mo. 1979) (en banc) limitation on retroactivity to the most compelling circumstances continue to have any viability?

6. What weight should an indemnification provision in the KCPL contract with the independent contractor, be given in the "balancing" test when determining the retroactivity of *Zueck*?

7. Did *Zueck* actually deal with matters of procedure, rather than substantive law--and should therefore be applied prospectively--because it is only a remedy (a tort suit) which is eliminated for injured independent contractor employees covered by workers' compensation?

8. Where there is an overruling decision, and Plaintiffs have already attempted to plead a direct liability claim against KCPL, should the case be remanded to permit a trial on the merits of those claims?

II. FACTUAL BACKGROUND

This is a wrongful death suit arising out of the death of Larry Dean Bunger in 1985 from injuries incurred while "squirrel-proofing" a transformer owned by KCPL. Appellants are Mr. Bunger's minor children. Mr. Bunger worked for an independent contractor hired by KCPL, and he was covered by workers' compensation. The written contract between KCPL

and the independent contractor contains an indemnification clause in favor of KCPL, if KCPL incurs any liabilities arising out of the performance of the contract.

At the trial level, Plaintiffs sought, and were denied, leave to file a Second Amended Petition which in Count I alleged direct or primary liability on the part of KCPL, and which in Count II alleged vicarious liability, based on Mr. Bunger's having been engaged in inherently dangerous activity, on the basis that Count I failed to state a claim for which relief could be granted. The trial court then permitted filing a Third Amended Petition containing only the vicarious liability theory.

In February, 1991, the jury entered a $2,000,000 verdict in favor of Appellants, reduced to $1,300,000 on an assessment of 35% fault against Mr. Bunger. While KCPL's Motion for New Trial or for Judgment N.O.V. was pending, this Court handed down *Zueck*, and on that basis alone, the trial court sustained the Motion for Judgment N.O.V.

III. THE BASIS FOR TRANSFER

The eight issues identified above provide a broad spectrum of reasons for this Court to transfer this case.

Both *Zueck* and *Aubuchon v. Hyland*, 820 S.W.2d 617 (E.D. Mo. App. 1992) involved non-expert land-owners, the type of owners expressly identified by the *Zueck* Court as the

basis for its opinion. Here, however, KCPL is unquestionably an expert owner, with a corporate knowledge and experience of the installation, use, modification and repair of transformers and other equipment used to generate and distribute electrical power, derived from its decades of operation, that results in KCPL's expertise being at least equal to, if not in all probability, greater than, that of any independent contractor. Whether *Zueck* applies to expert land-owners is a question of general interest and importance.

The Court of Appeals held that the *Sumners* "reliance" test, in the context of determining whether an overruling decision of this Court should be given retroactive effect, applies only to conduct prior to the event giving rise to the litigation. It is thus a question of general importance, relating to any future overruling decisions in which the Court does not announce whether the decision is to be applied retroactively, for lower courts and attorneys to know what the standards are.

The Court of Appeals also added a "foreshadowing" standard to the process, by holding that if this Court's overruling decision is "foreshadowed" (here, by the passage of the workers' compensation laws 60+ years prior to *Zueck*, and the acts of other states), then there can be no "reliance" under *Sumners* which would preclude retroactive application of the

overruling decision. Whether this is an appropriate addition is a question of general importance which should be resolved by this Court, particularly in relation to *Trans UCU, Inc. v. Director of Revenue*, 808 S.W.2d 374 (Mo. 1991) (en banc), in which this Court referred to a sudden change in direction (there, four years between the initial decision and the overruling decision) as the basis for a determination of non-retroactivity.

Whether the *Keltner* statement that overruling decisions should be applied retroactively only in the most compelling circumstances has any continued viability, in the absence of any discussion of "compelling" reasons for making *Zueck* retroactive, is a question of general interest or importance which should be resolved by this Court.

Whether *Zueck* actually involved a procedural decision, rather than a decision of substantive law, is an issue which should be clarified by this Court. If, as argued by Appellants, *Zueck* was a procedural decision because it eliminated a remedy for a specific group (the remedy of a tort claim for injured employees of independent contractors who are covered by workers' compensation), but did not eliminate the cause of action, which is still available for others, then should *Zueck* not be applied only prospectively?

Where there is an overruling decision which is the sole basis for a judgment n.o.v., and the plaintiffs have previously sought and been denied leave to file a direct (rather than vicarious) liability claim against the defendant, if the proposed count of the petition *does* state a claim on which relief should be granted, should the case be remanded for a trial on the merits of the direct liability claim(s)? Although overruling decisions by this Court are not necessarily frequent, they do happen, and thus it is important for this Court to clarify the policy which should be followed by the Courts of Appeals and the trial courts in circumstances such as these, *i.e.*, whether remand is not merely appropriate, but necessary, where the overruling decision eliminates the theory of recovery on which the case was tried, but does not eliminate the alternate theories which the plaintiffs sought to adduce. *Cf.*, *Smith v. Inter-County Telephone Company*, 559 S.W.2d 518, 525 (Mo. 1977) (en banc), and *Kaufmann v. Nagle*, 807 S.W.2d 19, 95 (Mo. 1991) (en banc).

Last, this case presents an opportunity for the Court to determine whether it is still possible to state a claim against a land owner for direct or primary liability, cf., Judge Blackmar's concurrence in *Zueck*, where an employee of an independent contractor is injured or killed while engaged in inherently

dangerous activity being performed for the benefit of the land-owner. Whether a land-owner who hires an independent contractor now enjoys absolute immunity from any direct or vicarious theory of liability, if the injured or killed employee of the independent contractor is covered by workers' compensation, is a question of general interest and importance which should be resolved by this Court.

The decision by the Western District in this case also appears to conflict with the standards of both *Keltner* and *Trans UCU, supra*, and thus this case merits examination by this Court.

Appellants incorporate by reference the Suggestions in Support which accompany this Application for Transfer.

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IN THE SUPREME COURT OF MISSOURI

JAMIE MARIE (BUNGER) PRAYSON, *et al.*,	)	
Appellants,	)	
vs.	)	Supreme Court No. ___
	)	Court of Appeals, Western District
	)	Circuit Court of Jackson County
KANSAS CITY POWER & LIGHT COMPANY,	)	
Respondent.	)	

SUGGESTIONS IN SUPPORT OF APPLICATION FOR TRANSFER

SECTION I. THE RETROACTIVITY OF ZUECK

A. *Zueck v. Oppenheimer Gateway Industries, Inc.*, 809 S.W.2d 384 (Mo. 1991) (en banc) involved the injury of a painter hired for the renovation of St. Louis' Union Station. *Aubuchon v. Hyland*, 820 S.W.2d 617 (E.D. Mo. App. 1992), which held that *Zueck* was not retroactive, involved construction work on a new building. In both cases, the land-owner who hired the independent contractor whose employee was later injured, was not itself an expert in the area of work being performed by the injured worker at the time of the accident. In sharp contrast to *Zueck* and *Aubuchon*, however,

Respondent KCPL is unquestionably an expert in the installation, use, modification, and repair of high-voltage power lines, transformers, and other equipment used in the generation and distribution of electrical power to KCPL's customers. *Zueck* focused on protecting a non-expert land-owner from vicarious liability, as a means of encouraging the owner to hire experts to perform inherently dangerous work. Applicationof *Zueck* to "expert" land-owners, with its attendant immunity from liability for the negligence of its chosen independent contractors, creates no incentive to hiring equal or greater expertise, but rather fosters the ability to select the cheapest, rather than best-qualified, independent contractor. This Court should determine whether *Zueck* applies to expert land-owners.

B. In *Wilkes v. Missouri Highway and Transportation Commission*, 762 S.W.2d 27 (Mo. 1988) (en banc), this Court held that a statute abrogating sovereign immunity was procedural, rather than substantive, because the cause of action still existed, but a remedy was either lacking because of sovereign immunity, or permitted by a waiver of sovereign immunity. In *Wilkes* an impediment to recovery was removed by the waiver of sovereign immunity; in *Zueck* an impediment to recovery was imposed. Post-*Zueck*, a cause of

action still exists for person's injured on another's land, but the remedy of a tort suit now exists only for employees of independent contractors engaged in inherently dangerous activity who are *not* covered by workers' compensation, and for other persons injured on the owner's land. This Court should decide whether *Zueck* announced a procedural change of course, and thus, under *Bethell v. Porter*, 595 S.W.2d 369 (W.D. Mo. App. 1980), should be applied prospectively only.

C. *Keltner v. Keltner*, 589 S.W.2d 235, 239 (Mo. 1979) (en banc), said that an overruling decision should be found to be retroactive only in the most compelling circumstances. Is depriving minor children of a $1.3 million verdict reached three months prior to *Zueck* a sufficiently compelling circumstance tojustify retroactive application? In light of the standards of *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. 1985) (en banc), does the *Keltner* holding still have any viability? This Court should resolve this issue.

D. The Western District held that the "reliance" portion of the *Sumners* tests involves only conduct prior to the event which gives rise to the litigation. Appellants suggest there is no significant difference between the business decisions made in *Trans-UCU, Inc. v. Director of Revenue*, 808 S.W.2d 374 (Mo. 1991) (en banc) in reliance on existing

law and an attorney's advice, and the litigation decisions made here in reliance on an attorney's advice and on then-existing law: *Mallory v. Louisiana Pure Ice Company*, 320 Mo. 95, 6 S.W.2d 617 (1928); *Smith v. Inter-County Telephone Company*, 559 S.W.2d 518 (Mo. 1977) (en banc), and *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. 1990) (en banc). In both *Trans-UCU* and here, a client undertook a course of activity and incurred substantial expenditures in the belief that a particular state of law was in effect, and after undertaking the activity and incurring the expense, the state of the law changed. This Court should determine whether the reliance test in *Sumners* is limited to conduct prior to the event which generates the litigation, or whether it can also include post-event conduct, such as the process of deciding whether and how to proceed with litigation.

E. This Court should determine the appropriateness of the Western District's supplement to the *Sumners* and *Trans-UCU* standards for determining the retroactivity of an overrulingdecision. The Western District essentially has said that if an overruling decision by this Court was "foreshadowed," a plaintiff cannot justifiably rely on his attorney's advice about the existing state of the law. The Western District said that since *Mallory* was decided before

enactment of the workers' compensation law, the passage of that statute in the late 1920's, plus the adoption by other states of the *Zueck* principle of no vicarious liability for the land-owner for injuries to an independent contractor's employee engaged in inherently dangerous activity, where the employee is covered by workers' compensation, "foreshadowed" this Court's decision in *Zueck* in 1991. Despite sixty years of either judicial silence on the principle of a land-owner's vicarious liability for inherently dangerous work performed by an independent contractor, or judicial approval of that principle, this Court's change of direction in *Zueck* was "foreshadowed," and thus there was no "reliance" by Appellants under *Sumners*. Are attorneys now to be required to base advice to clients not on the current state of the law, but on their speculation and conjecture as to what this Court might do several years in the future? These are questions which should be resolved by this Court.

F. Where a land-owner has a written contract with an independent contractor which indemnifies the land-owner from any costs arising out of the negligence of the contractor, should that factor be considered in the *Sumners* evaluation process, particularly when determining where the burden of the impact of *Zueck* should be placed: the minor children whose

father is dead,the independent contractor, or the land-owner? The contractor here negotiated away any statutory immunity it might have had to a suit by KCPL for contribution or indemnification. Just as *Zueck* found that workers' compensation premiums were included in the contract price between land-owner and contractor, it necessarily follows that liability insurance premiums to cover the indemnification were also included in the KCPL contract here. As between KCPL and these children, then, the burden for the loss should fall on KCPL, and KCPL and its contractor can then "fight out" any legal issues relating to indemnification. The Court should determine what weight this contract provision should have in the *Sumners* balancing process.

SECTION II. KCPL DIRECT LIABILITY

The Western District decision focused solely, and erroneously, on a premises liability theory in examining Appellants' direct liability claims against KCPL, and basically ignored the other theories offered by Appellants: the safe workplace doctrine, the retention of possession doctrine, and the retention of control doctrine. Appellants also argued that the contract with the independent contractor, with its specification by KCPL of the safety standards to be applied in performing the work, made Mr. Bunger, and therefore his

surviving children as well, third-party beneficiaries of that contract.

The Western District mistakenly determined that the mere existence of electric power lines was the dangerous condition on the premises, and then decided, as a matter of law--and in a comparative fault state--that Mr. Bunger was aware of the dangersof high voltage lines and therefore Appellants could not recover. The dangerous condition, however, was not just the high-voltage lines, but the fact that the transformer did not have to be totally de-energized before it could be worked on. (This lack of complete de-energizing contributed significantly to Mr. Bunger's death.) Even under a premises liability theory, the issues of the exact nature of the dangerous condition, KCPL's knowledge of it, whether KCPL could have warned the independent contractor of the condition, and the knowledge of the independent contractor of the condition, are all jury questions. It is not the province of the Court of Appeals to decide as a matter of law that a jury could not assess any percentage of fault to KCPL on a direct liability claim, under any of the theories offered by Appellants. Under both *Smith, supra,* and *Kaufmann v. Nagle*, 807 S.W.2d 91, 95 (Mo. 1991) (en banc), this case should have been remanded for a trial on Appellants' direct liability claims.

SECTION III. CONCLUSION

The specific questions relating to the retroactivity of *Zueck*, and the broader questions relating to the standards to be applied in determining whether an overruling decision of this Court is retroactive, are questions of general interest and general importance which should be resolved by this Court, as should the constitutional arguments relating to retroactivity, the applicability of *Zueck* to expert land-owners, and whether Appellants *did* state a claim in Count I of their proposed Second Amended Petition, so that a remand and trial on the direct or primary liability theory is necessary.

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FILED
JUN 16 1993

No. 92-2069

In The

Supreme Court of the United States

October Term, 1993

JAMIE MARIE PRAYSON, *et al.*,

Petitioners,

vs.

KANSAS CITY POWER & LIGHT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

RESPONDENT'S BRIEF IN OPPOSITION

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Date: July 16, 1993

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COUNTERSTATEMENT OF QUESTION PRESENTED

Respondent respectfully suggests that the issue framed by petitioners is more correctly stated as follows:

> Do the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution prohibit retroactive application of a Missouri Supreme Court decision (which changed Missouri's tort law), the effect of which was to reverse a non-final judgment entered on a jury verdict awarded in petitioners' favor in a wrongful death case prior to the date of the decision which was applied retroactively?

RULE 29.1, STATEMENT

Respondent Kansas City Power & Light Company, a Missouri corporation, is not a subsidiary corporation of any other corporation and all of its subsidiary corporations are wholly owned by Kansas City Power & Light Company, with the sole exception being the Wolf Creek Nuclear Operating Corporation.

REASONS FOR DENYING THE WRIT

I. **In *Harper v. Virginia Department of Taxation*, 61 U.S.L.W. 4664 (June 18, 1993) this Court held that nothing in the United States Constitution prohibits the retrospective application of judicial decisions, which has been a fundamental rule of law for nearly a millennium. Indeed, it further held that when it applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and *must be given full retroactive effect* in all cases still open on direct review *and as to all events*, regardless of whether such events predate or post-date the announcement of the rule and notwithstanding the fact that such rule is contrary to existing precedent on which parties may have relied or establishes a new principle of law not clearly foreshadowed by previous authority. In so doing, it further held that neither it nor any other federal court had the authority to apply such a rule only prospectively, thus effectively overruling *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971), the case upon which petitioners principally rely in seeking a writ of certiorari. As it is clear that nothing in the United States Constitution prohibits retrospective application of federal judicial decisions concerning federal law, it is equally clear that nothing in the United States Constitution prohibits retrospective application of state judicial decisions concerning state law. Accordingly, petitioners do not present a question of federal law and the Court lacks jurisdiction in the premises.**

"Nothing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions . . . for near a thousand years.' *Kuhn v.*

Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)." *Harper, supra* at 4666.

The week before the petition for certiorari in this case was filed, the Court held that federal courts applying federal law are *required* to give retroactive effect to the decisions of the Court. Although no fifth or fourteenth amendment due process or equal protection arguments *per se* are addressed in *Harper, supra* the Court very plainly stated that *selective application of new rules* violates the principle of treating similarly situated parties the same.

More might be said in opposition to the petition. The length of this Brief could be considerably extended. For example, detailing how petitioners knew from the date six years ago when respondent filed its *first motion to dismiss* showing that thirteen (13) other states had all uniformly rejected the theory under which this case had been filed, and how petitioners nevertheless stubbornly pursued this litigation in the face of overwhelming contrary legal authority from *every other state*, just as they now are pursuing a petition for certiorari in this Court in the face of obvious controlling authority to the contrary, could consume several pages.

In view of the Court's holding in *Harper* that retroactive effect is *required* to be given to Supreme Court decisions in federal courts applying federal law, arguing that the due process and equal protection clauses *prohibit* state courts from giving retroactive effect to the decisions of

their Supreme Court is preposterous. The prudent use of the Court's time dictates terminating this Brief anon.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the Missouri Court of Appeals, Western District should be denied.

Respectfully submitted,

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